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W. H. Marbury

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1924

No. [redacted]53

JOSHUA W. MILES, FORMERLY UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND, PLAINTIFF IN ERROR,

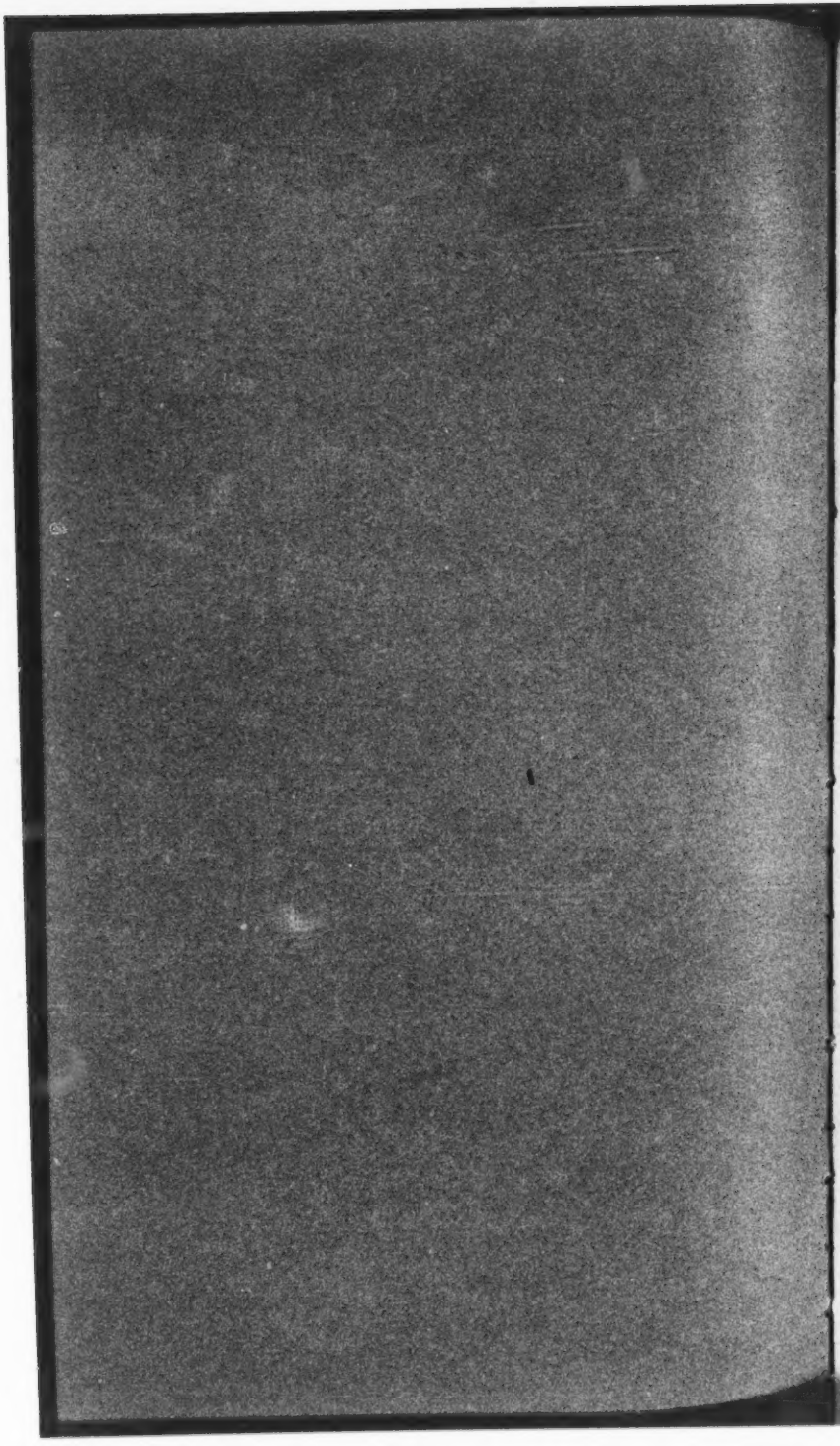
vs.

SAMUEL J. GRAHAM.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

FILED APRIL 21, 1925.

(29580)



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

No. 311.

SHUA W. MILES, FORMERLY UNITED STATES COL-LECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND, PLAINTIFF IN ERROR.

vs.

SAMUEL J. GRAHAM.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

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SAMUEL J. GRAHAM,

vs.

JA W. MILES, FORMERLY UNITED STATES COLLECTOR OF INTERNAL REVENUE for the District of Maryland.

In the District Court of the United States for the District of Maryland.

Declaration.

Filed 18th August, 1922.

tle omitted.]

nuel J. Graham, a citizen of the State of Virginia, sues Joshua Miles, the duly appointed United States Collector of Internal nue for the District of Maryland during the times hereinafter s declaration mentioned.

st count. For that the plaintiff, Samuel J. Graham, on the first f September, 1919, after being duly appointed by the President e United States and confirmed by the Senate, took the oath of and qualified as one of the judges of the United States Court aims, one of the inferior courts of the United States established ongress in pursuance to the power vested in it by Article III, n I, of the Constitution of the United States. That at all times said first day of September, 1919, said plaintiff has held said of judge of said United States Court of Claims. That at the and prior to the time when this plaintiff became judge of said as aforesaid the compensation fixed by law for said office was ty-five hundred dollars ($7,500.00) per annum, and this plain- leges that by virtue of his appointment to and qualification for ffice he thereupon became entitled to hold the same during good ior, and to receive the compensation provided therefor at said without any diminution therefrom in the form of taxes levied on or otherwise throughout his tenure therein.

at during the year 1920 there was assessed against this plaintiff by said defendant, the then duly appointed and acting Collector of Internal Revenue for the District of Maryland, for and on account of the salary received by him during the 1919 as judge of said United States Court of Claims certain d taxes amounting to seventy-one dollars and ninety cents 90) under the pretended authority of a provision of an act of ress, approved February 24, 1919. That said alleged taxes assessed against this plaintiff upon the theory and contention d defendant that the said salary so received by this plaintiff g the year 1919 for and on account of his services as one of the or courts of the United States established by Congress in pur-

suance of the power vested in it as aforesaid was taxable income within the meaning of said act of Congress approved February 24, 1919, and particularly by virtue of section 213 of said act which provides—

"SEC. 213. That for the purposes of this title (except as otherwise provided in section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States * * * the compensation received as such."

That this plaintiff at the time of said assessment and before the payment of said alleged taxes in the manner hereinafter particularly set forth, notified said defendant of his, the said plaintiff's, claim and contention that said supposed assessment of taxes under the pretended authority of said act of Congress or of any other act was utterly null and void, and contrary to the express inhibition contained in said Article III, section I, of the Constitution of the United States.

That this plaintiff thereupon on the second day of December, 1920, duly filed in accordance with law and with the regulations of the Commissioner of Internal Revenue his claim for abatement, which said claim was subsequently rejected by said Commissioner of Internal Revenue.

4 That notwithstanding the claim and contention of this plaintiff and his assertion of a constitutional right to have his salary as fixed by law remain undiminished during his continuance in office, the said defendant, acting in his capacity as the duly appointed and qualified Collector of Internal Revenue for the District of Maryland (within which this plaintiff resides, and to the jurisdiction of which district this plaintiff in matters pertaining to Federal revenue and income taxes is subject), demanded of this plaintiff the payment of said taxes so assessed against the salary received by him as a judge of the United States Court of Claims during the year 1919, as aforesaid, namely the sum of seventy-one dollars and ninety cents ($71.90), and this plaintiff in order to avoid the penalties threatened and the liability of his property to distraint, did on the 4th day of May, 1921, pay to said defendant under protest the amount demanded, namely seventy-one dollars and ninety cents ($71.90), together with certain penalties which said defendant asserted had already accrued.

Whereupon the plaintiff immediately after said payment, namely, on the said 4th day of May, 1921, filed his claim for a refund of said amount so paid under protest and appealed to the Commissioner of Internal Revenue to reverse the action of the defendant in the premises and to refund to the plaintiff the amount of said alleged tax so illegally and unconstitutionally levied and collected as aforesaid. That in filing his appeal for the refunding of said amount so paid by this plaintiff to the defendant with the said Commissioner of

Internal Revenue, this plaintiff complied in all respects with the provisions of law and with all regulations and requirements of the Commissioner of Internal Revenue in that belief.

That the said Commissioner of Internal Revenue did on the 5th day of April, 1922, deny said appeal of this plaintiff for a refund of said amount of seventy-one dollars and ninety cents ($71.90) illegally and unconstitutionally exacted of him as aforesaid and did refuse to authorize and direct the repayment of said amount to the plaintiff.

5 The plaintiff further says that the said provision of section 213 of the said act of February 24, 1919, in pursuance of which the defendant claimed to act in assessing, levying, and collecting the said amount of seventy-one dollars and ninety cents ($71.90) and the said penalties, has been held by the Supreme Court of the United States in the case of Evans vs. Gore, 253 U. S. 245, to be null and void insofar as it purports or pretends to levy a tax upon judges of the Supreme or inferior courts of the United States for or on account of the compensation received by them for their services in said offices, and that said decision is binding upon the defendant, and upon all officers, departments, and agencies of the United States in the administration of said act of February 24, 1919; that accordingly the said defendant was without warrant of law in compelling this plaintiff to pay said amount of seventy-one dollars and ninety cents ($71.90) as aforesaid.

Second count. For that the plaintiff, Samuel J. Graham, on the first day of September, 1919, after being duly appointed by the President of the United States and confirmed by the Senate, took the oath of office and qualified as one of the judges of the United States Court of Claims, one of the inferior courts of the United States established by Congress in pursuance to the power vested in it by Article III, section I, of the Constitution of the United States. That at all times since said first day of September, 1919, said plaintiff has held said office of judge of said United States Court of Claims. That at the time and prior to the time when this plaintiff became judge of said court as aforesaid the compensation fixed by law for said office was seventy-five hundred dollars ($7,500.00) per annum, and this plaintiff alleges that by virtue of his appointment to and qualification for said office he thereupon became entitled to hold the same during good behavior, and to receive the compensation provided therefor at said time without any diminution therefrom in the form of taxes levied thereon or otherwise throughout his tenure therein.

That during the year 1921 there was assessed against this
6 plaintiff by said defendant, the then duly appointed and acting Collector of Internal Revenue for the District of Maryland, for and on account of the salary received by him during the year 1920 as judge of said United States Court of Claims certain alleged taxes amounting to three hundred and thirteen dollars and thirty-one cents ($313.31) under the pretended authority of a provi-

sion of an act of Congress, approved February 24, 1919. That said alleged taxes were assessed against this plaintiff upon the theory and contention of said defendant that the said salary so received by this plaintiff during the year 1920 for and on account of his services as one of the inferior courts of the United States established by Congress in pursuance of the power vested in it as aforesaid, was taxable income within the meaning of said act of Congress approved February 24, 1919, and particularly by virtue of section 213 of said act which provides—

"Sec. 213. That for the purposes of this title (except as otherwise provided in Section 233) the term 'gross income'—

"(a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States * * * the compensation received as such)."

That this plaintiff at the time of said assessment and before the payment of said alleged taxes in the manner hereinafter particularly set forth, notified said defendant of his, the said plaintiff's claim and contention that said supposed assessment of taxes under the pretended authority of said act of Congress or of any other act was utterly null and void, and contrary to the express inhibition contained in said Article III, section I, of the Constitution of the United States.

That this plaintiff thereupon on the thirty-first day of December, 1921, duly filed in accordance with law and with the regulations of the Commissioner of Internal Revenue his claim for abatement which said claim was subsequently rejected by said Commissioner of Internal Revenue.

7 That notwithstanding the claim and contention of this plaintiff and his assertion of a constitutional right to have his *slary* as fixed by law remain undiminished during his continuance in office, the said defendant acting in his capacity as the duly appointed and qualified Collector of Internal Revenue for the District of Maryland (within which this plaintiff resides, and to the jurisdiction of which District this plaintiff in matters pertaining to Federal revenue and income taxes is subject), demanded of this plaintiff the payment of said taxes so assessed against the salary received by him as a judge of the United States Court of Claims during the year 1920 as aforesaid, namely the sum of three hundred and thirteen dollars and thirty-one cents ($313.31), and this plaintiff in order to avoid the penalties threatened and the liability of his property to distraint, did on the 14th day of March, 1921, pay to said defendant under protest, seventy-eight dollars and thirty-three cents ($78.33), being the first quarterly payment of the whole assessment for the year 1920. The remaining payments for the calendar year 1920 were made by checks dated, respectively, June 13, 1921, in the amount of seventy-eight dollars and thirty-three cents ($78.33); September 13, 1921, in the amount of seventy-eight dollars and

thirty-three cents ($78.33); and December 15, 1921, in the amount of seventy-eight dollars and thirty-two cents ($78.32). These payments were all made under protest.

Whereupon the plaintiff immediately after said last payment, namely, on the 31st day of December, 1921, filed his claim for a refund of said amount so paid under protest and appealed to the Commissioner of Internal Revenue to reverse the action of the defendant in the premises and to refund to the plaintiff the amount of said alleged tax so illegally and unconstitutionally levied and collected as aforesaid. That in filing his appeal for the refunding of said amount so paid by this plaintiff to the defendant with the said Commissioner of Internal Revenue, this plaintiff complied in all respects with the provisions of law and with all regulations and requirements of the Commissioner of Internal Revenue in that behalf.

8 That the said Commissioner of Internal Revenue did on the 6th day of June, 1922, deny said appeal of this plaintiff for a refund of said amount of three hundred and thirteen dollars and thirty-one cents ($313.31) illegally and unconstitutionally exacted of him as aforesaid and did refuse to authorize and direct the repayment of said amount to the plaintiff.

The plaintiff further says that the said provision of section 213 of the said act of February 24, 1919, in pursuance of which the defendant claimed to act in assessing, levying, and collecting the said amount of three hundred and thirteen dollars and thirty-one cents ($313.31), has been held by the Supreme Court of the United States in the case of Evans vs. Gore, 253 U. S. 245, to be null and void in so far as it purports or pretends to levy a tax upon judges of the Supreme or inferior courts of the United States for or on account of the compensation received by them for their services in said offices, and that said decision is binding upon the defendant, and upon all officers, departments, and agencies of the United States in the administration of said act of February 24, 1919; that accordingly the said defendant was without warrant of law in compelling this plaintiff to pay said amount of three hundred and thirteen dollars and thirty-one cents ($313.31) as aforesaid.

And the plaintiff claims six hundred dollars ($600.00)

MARBURY, GOSNELL & WILLIAMS,
Attorneys for plaintiff.

WM. L. MARBURY,
Of Counsel.

To the defendant:

Take notice—In accordance with the rules of the District Court of the United States for the District of Maryland, you will be required to plead to the declaration in this action before the next succeeding return day to that to which you may be summoned

9 or else judgment by default will be entered against you.

MARBURY, GOSNELL & WILLIAMS,
Attorneys for plaintiff.

10 In the District Court of the United States.

Demurrer.

Filed 3d October, 1922.

[Title omitted.]

The defendant, Joshua W. Miles, by A. W. W. Woodcock, his attorney, demurs to the declaration filed in this case, and says it is bad in substance and insufficient in law, for the reason that the office of Judge in the United States Court of Claims is not such an office as is protected by the Constitution of the United States against the decrease in salary during the incumbency of the holder.

A. W. W. WOODCOCK,
United States Attorney.

11 In the District Court of the United States.

Additional grounds for demurrer.

Filed 24th October, 1922.

[Title omitted.]

The defendant, by Amos W. W. Woodcock, his attorney, for further grounds of his demurrer heretofore filed in this case, says that the salary of the plaintiff in this case was not reduced during his tenure of office, for the reason that the law, under which the taxes said to be recovered were levied, was passed prior to his appointment as judge of the United States Court of Claims.

A. W. W. WOODCOCK,
United States Attorney.

12 In the District Court of the United States.

Opinion of Court.

Filed 21st November, 1922.

[Title omitted.]

ROSE, District Judge:

The plaintiff, Samuel J. Graham, is a judge of the Court of Claims having, after due appointment and confirmation, qualified as such on September 1, 1919. He is here suing to recover an aggregate of $385.21, being the amount of the income taxes for 1919 and 1920 paid by him under protest, because of the inclusion in his taxable income by the defendant, then Collector of Internal Revenue, of plaintiff's salary as judge of an inferior court of the United States.

The defendant has demurred to the declaration and, as the facts are undisputed, the ruling upon the demurrer will, in all probability, determine the case.

A brief history of the legislation of Congress, so far as it relates to the imposition of an income tax upon presidential and judicial salaries, may aid in making clear the precise points here involved. By the act of 1913, which was the first taxing statute after the adoption of the Sixteenth Amendment, it was provided, in subdivision B of section 2, 38 Stat. 168, "That in computing net income under this section there shall be excluded the * * * compensation of the present President of the United States during the term for which he has been elected, and of the judges of the Supreme and inferior courts of the United States now in office, * * *." Section 4 of the act of 1916 (39 Stat. 758) used the same language, and thereby apparently relieved from taxation the salaries of such judges as had come into office between 1913 and September 8, 1916, when the revenue act of the latter year received Executive approval. As the rates imposed in 1916 were higher than those levied three years before, and as Congress still acted under the assumption that the salary a Federal judge was entitled to receive when he went into office could not be diminished by subsequently imposed taxes, the probabilities are that the release from taxation of the salaries of all judges in office in 1916 was deliberate.

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The revenue act of 1918, as it is officially called, although it was not approved until February 24, 1919, repealed the law of 1916 and imposed new and still heavier rates of taxation. Congress then made up its mind to attempt to tax the salaries of the President and all the Federal judges. The advocates of the new policy frankly admitted that there was grave doubt as to whether it was constitutional, but said it was desirable to have the question finally settled, and the way to do so was to impose the tax so that the Supreme Court might pass upon its validity. It is obvious, from the debates in the House (56 Cong. Record, part 10, pages 10365 et seq.) and from the reports of the committees of the two Houses, that the reason for making the attempt was not so much the desire to get for the Treasury the comparatively small sum that would be yielded by the tax upon presidential and judicial salaries as it was to establish the rule that all persons whatsoever should contribute in the manner and at the rates prescribed by the act.

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It should be said that the legislative history of the measure does not indicate any hostility to the judiciary, but it does show how strong was the feeling that in matters of taxation judges should be dealt with as was everybody else.

Then, on June 1, 1920, the Supreme Court, in Evans vs. Gore, 253 U. S. 245, decided that the provision in question was in conflict with the Constitution and was, therefore, invalid. The case

actually before them was that of a judge who had come into office as far back as 1899.

Subsequent to the decision of the court no further taxing act was passed until November 23, 1921, some time after Judge Graham's term of office began. Although the provision in the act of 1918, in so far as it attempted to include intaxable income the salaries of judges appointed before its enactment has been held void and of no effect, the Government contends first, that Congress might constitutionally have provided for the taxing of the salary of a judge subsequently coming into office, and, second, that the provision of section 1402 of the act of February 24, 1919 (40 Stat. 1150), requires that the tax shall be levied upon the salary of the plaintiff, who admittedly became a judge subsequent to its passage. To this the plaintiff replies that Congress may not tax the salary of any judge of the United States, irrespective of whether he entered on his office before or after the act was passed, and even if that be not so, that the statute here attempted to tax all judges and that effort having failed

it is not within the power of the court to say that Congress
15 would not have taxed a few judges if it had known that its effort to levy the charge upon the great majority would fail.

The first issue raised is obviously of far-reaching importance. On behalf of the plaintiff it is said that the Constitution intended to protect the independence of the executive and judicial branches of the Government against the possible desire of the legislature to control them.

Unless the salary of a judge would have been taxable before the Sixteenth Amendment, it may not be taxed now, for that amendment does not subject to taxation anything which could not before have been taxed, but merely exempts a tax upon incomes from a previously existing requirement of apportionment among the States. Evans vs. Gore, supra.

The inclusion of a salary of a judge in his taxable income is a tax upon it and a diminution of its amount. The contention that it is a charge upon his income as a whole, in which his salary as become so far merged that the source from which it comes is no longer material, was definitely rejected in the last cited case. The framers of the Constitution, by the detail into which they went in this matter, evidenced how solicitous they were to protect the pecuniary independence of the judges from indirect, as well as direct, attack. Not only are their salaries not to be diminished during their continuance in office, but the Constitution takes pains to provide that they shall be paid to "them at stated times." It is urged that part of what the Constitution requires to be paid at a stated time can not afterwards be taken back. The payment once made is altogether irrevocable by any means or device whatsoever.

It is further said that in practice it will be impossible to
16 secure a judge against any greater tax than that which was imposed by the taxing statutes in force when he went into office. Under our system of surtaxes, constantly changing, both

in rate and method of ascertainment, and even under the same statute being greatly affected by the greater or less receipt of income from other sources, the actual tax imposed upon a judge's salary will constantly vary. If the past is any criterion for the future, the taxing statutes will be materially altered every few years, with the result that there will be among the judges any number of classes, each subject to a different tax being that in force when they went into office, and thus there will be no uniformity in the burdens imposed upon them.

To sum up the whole matter, it is urged that the Constitution shows an unmistakable intention to deny to Congress any power to cut down a judicial salary. The Government replies that a tax imposed upon a compensation before a judge goes into office is merely an exercise of the admitted power of Congress to fix a lower salary for judges subsequently appointed than it was paying those already on the bench, and it is suggested that it makes no real difference whether the amount of the tax is deducted from the salary before it is paid the judge or is subsequently compulsorily collected from him. It will be noted that this argument loses sight of the practical fact that, as our tax laws are, it will not be possible to ascertain in advance the amount of a tax and, as a consequence, the amount of a salary which is guaranteed him, for that will depend on many things which may happen after the judge goes into office, or even after the salary is payable and, under the Constitution, must be paid.

If the question were as simple as the Government represents it to be, there would be no occasion to raise it at all. If Congress were content to reduce the salaries of judges hereafter to be ap-
17 pointed by a sum, in its view, equivalent to the tax on their salaries if the latter were taxable, there is absolutely nothing in the way of its doing so. If it thinks 6 per cent is about the tax which they should pay, it may provide that the salaries of all district judges hereafter to be appointed shall be not $7,500 as now, but only $7,050, and of all circuit judges $7,990 instead of $8,500, and so on. That way of accomplishing the same result which, the Government claims, is attained by the present law, is obvious and easy. The failure of Congress to adopt it and the fact that no one seems ever seriously to have proposed it, strongly suggests that the end really sought could not in that way be reached. What is wanted is not to make a saving in the net charge upon the Treasury for judicial salaries, but to include the salaries of the judges in their taxable income so that they may be assessed as other men are.

If the view of Mr. Justice Holmes as expressed in his dissenting opinion in Evans vs. Gore, supra, concurred in as it was by Mr. Justice Brandeis, had prevailed, the whole matter would be simple enough. The income tax, though based on a total income of which the salary is a part, from that standpoint was not a tax upon the salary at all, and consequently was not a diminution of it. But the court of last resort has held otherwise, and it may be difficult to see how, in accordance with views therein expressed, it is possible

for Congress constitutionally to impose upon judicial salaries such income taxes as are now levied, at least in the way in which their amounts are now ascertained. Whether it can or can not be done, it is, fortunately, not necessary in this case to decide, for it would seem to be clear that in any event the declaration of plaintiff
18 discloses a good cause of action. Unless he was taxable under the act of 1918 he was not taxable at all. If he is taxable under that statute, he is so by virtue of a clause which applies to all the Federal judges, irrespective of the time they came upon the bench. That clause as written has been held invalid. The Government, however, contends that because of the provisions of section 1402 of the revenue act of 1918 (40 Stat. 1150) the provision still remains in force so far as concerns judges who took office, as did the plaintiff, after its enactment. The section relied upon is as follows: "That if any clause, sentence, paragraph, or part of this act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered." Obviously, however, this section does not help the defendant. When the clause which has been declared invalid is out of the act, no other imposes the tax. What the court here is asked to do is to rewrite the pertinent portion of the statute in question so that it will read as did the provisions of the acts of 1913 and 1916 relative to this general subject. But that would be for the court to do what Congress expressly decided not to do. With its eyes wide open to the possible consequences, it made up its mind to seek uniformity by imposing the tax upon all judges. Whether it would or would not have been willing to tax the minority, if the majority were immune, nobody knows, perhaps not even the members of that Congress itself, for upon that question they never were called upon to make up their minds.

In the revenue act of 1921 there is a section which, if it had been present in the act of 1918, would have afforded a far stronger ground for the Government's contention. It is numbered 1403 (42
19 Stat. 321) and declares "That if any provision of this act, or the application thereof to any person or circumstances, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby."

A ground assigned in defendant's original demurrer to the plaintiff's declaration is that the Court of Claims is not one of the inferior courts of the United States. This contention was abandoned at the argument and rightly so.

As the statutes and the decisions stand, the demurrer to the plaintiff's declaration must be overruled.

In the District Court of the United States.

Order of court overruling defendant's demurrer.

Filed 21st November, 1922.

[Title omitted.]

This case coming on to be heard upon the demurrer filed by the defendant, it is thereupon this 21st day of November, 1922, ordered by the District Court of the United States for the District of Maryland that the demurrer be overruled.

JOHN C. ROSE,
District Judge.

In the District Court of the United States.

Waiver of jury trial.

Filed 27th December, 1922.

[Title omitted.]

It is agreed between the parties to this cause that a jury trial shall be waived and that the case shall be tried before the judge of this court, without the aid or intervention of a jury.

WILLIAM L. RAWLS,
WILLIAM L. MARBURY,
Attorneys for the Plff.
A. W. W. WOODCOCK,
Attorney for the Defendant.

Whereupon and in pursuance of the said agreement of counsel the cause aforesaid was submitted to the court without a jury, and the court after such submission passed an order directing the entry of a verdict for the plaintiff in the above-entitled cause for the sum of three hundred and eighty-five dollars and twenty-one cents ($385.21), which order is in the words and figures following, to wit:

In United States District Court.

Order of court directing entry of verdict.

Filed 27th December, 1922.

[Title omitted.]

This case coming on to be heard, in pursuance of the agreement of counsel the issues joined as aforesaid between the parties aforesaid were tried before the court without a jury, and it being stated in open court by the attorney for the defendant that the allegations of fact contained in the declaration of the plaintiff were not disputed by the defendant and that said defendant would not require evidence to be produced in support of the same, but that said allegations might be taken by the court as true, it is therefore ordered this 27th day of December, 1922, by the District Court of the United States for the District of Maryland that the plaintiff

is entitled to recover against the defendant the sum of three hundred and eighty-five dollars and twenty-one cents ($385.21) of the sum claimed in the declaration and in addition the sum of $17.60 hereby adjudged by the court unto the plaintiff for his costs and charges by him about his suit in this behalf expended, and it is further ordered by the court that a verdict be entered for the plaintiff accordingly.

JOHN C. ROSE,
District Judge.

In United States District Court.

Judgment.

And thereupon in pursuance of said order a verdict for the plaintiff for the sum of $385.21 was entered accordingly.

Therefore it is considered by the court here that the said plaintiff recover against the said defendant as well the said sum of $385.21 for his damages as the sum of $17.60 adjudged by the court here unto the said plaintiff for his costs and charges by him about his suit in this behalf expended; and the said defendant in mercy and that the said plaintiff have hereof his execution, etc.

Memorandum.

Verdict was rendered in above-entitled case on the 27th day of December, 1922, and judgment on the 29th day of December, 1922.

23 In the District Court of the United States.

Certificate of probable cause.

Filed 28th December, 1922.

[Title omitted.]

I, John C. Rose, Circuit Judge of the United States and sitting in the District Court of the United States for the District of Maryland, on this 30th day of December, 1922, do hereby certify as follows:

1. That on the 18th day of August, 1922, the declaration in the above-entitled case was filed, seeking the recovery of taxes paid by the plaintiff. The taxes sought to be recovered amount to $385.21 and comprise $71.90 paid by the plaintiff under protest for the year 1919 under authority of the act of Congress approved February 24, 1919, and $313.31, similarly paid by the plaintiff for the year 1920 under the same authority. Plaintiff claimed that Congress had no authority to impose an income tax upon him because his income was in part derived from his salary as judge of the Court of Claims of the United States. The facts are set forth in the declaration. The defendant filed a demurrer to the declaration, which was overruled. The defendant declining to plead further, judgment was on the 29th day of December, 1922, entered against the defendant for the sum of $385.21.

2. The acts done by the said defendant, Joshua W. Miles, as then collector of internal revenue, in imposing and assessing, and exacting and collecting the said tax as above set forth, were done in his official capacity as such collector of internal revenue, and
24 the said Joshua W. Miles had probable cause for his said acts, notwithstanding the fact that a part of said tax on decedent's estate was erroneously collected and judgment has been rendered for a refund thereof in this case.

JOHN C. ROSE,
United States Circuit Judge.

25 In the District Court of the United States.

[Title omitted.]

Docket entries.

1922.

Aug. 18. Declaration and notice to plead filed.
" " Summons issued retble 1" Tuesday in September next. Copy declaration and notice and copy writ sent to be served. (Summoned Joshua W. Miles and copy of writ, copy of declaration, and copy of notice left with him this 22nd day of August, 1922.)
Oct. 3. Demurrer filed.
" 24. Additional grounds for demurrer filed (service admitted).
Nov. 21. Opinion of court on demurrer filed.
" " D murrer overruled. Order of court filed.
Dcer. 27. Defendant refused in open court to plead.
" " Waiver of jury trial filed.
" " Case submitted to the court without a jury.
" " Verdict for the plaintiff for the sum of three hundred eighty five dollars and twenty one cents. Order filed.
" 29. Judgment on verdict for the plaintiff for the sum of three hundred, eighty five dollars and twenty one cents and costs.
" 30. Certificate of probable cause filed.

1923.

Mch. 20. Petition of defendant for writ of error and order of court directing writ of error to issue as prayed same to act as a supers deas of the judgment herein and of the costs and damages on appeal filed.
" " Defendant's assignment of errors filed.
" " Writ of error issued retble within 30 days from date. Copy filed.
" " Citation issued retble before the Supreme Court of the United States within thirty days from this date. (Service acknowl dged.)
Apr. 17. Stipulation of counsel as to making up transcript of record on appeal filed.

26 In the District Court of the United States.

Petition for writ of error and order allowing same.

Filed 20th March, 1923.

[Title omitted.]

To the Honorable John C. Rose, United States Circuit Judge:

The petition of Joshua W. Miles, formerly United States Collec of Internal Revenue for the District of Maryland, the defend in the above entitled cause, by A. W. W. Woodcock, United Sta Attorney, his attorney, prays that he may be allowed a writ error to the Supreme Court of the United States from the jud ment entered in the said cause on the 29th day of December, 192 that a writ of error and citation may be issued and served up Samuel J. Graham, the plaintiff in the above entitled cause, or attorney; that the record of the proceedings in said cause be tra mitted to the Supreme Court of the United States; that the s judgment be reversed in so far as the same is in favor of the s plaintiff, and that judgment may be entered in favor of the defe ant; and that upon the service of a citation said writ of error m operate as a supersedeas until the final disposition of the said ca by the Supreme Court of the United States.

In support of this petition your petitioner hereby presents assignment of errors.

A. W. W. Woodcock,
United States Attorney,
Attorney for Defendant.

27 The prayer of the foregoing petition is granted and a writ error is ordered to be issued as prayed, the same to act as supersedeas of the judgment herein, and of the costs and damages appeal.

John C. Rose,
United States Circuit Judge.

Dated March 20, 1923.

28 In the District Court of the United States.

Assignment of Errors.

Filed 20th March, 1923.

[Title omitted.]

Now comes Joshua W. Miles, defendant in the above entitled caus and files the following assignment of errors upon which he will re upon his prosecution of the writ of error allowed in the above entitl cause entered by this honorable court on the 20th day of March, 192

1. That the District Court erred in ruling that under the act of Congress approved February 24, 1919, sometimes called the revenue act of 1918, the salary of a judge of the Court of Claims of the United States, who duly qualified as such on September 1, 1919, for the year 1919 and for the year 1920, may not be included in determining his taxable income for the purposes of the taxes upon incomes imposed by the said act of Congress for those years.

2. That the District Court erred in overruling the demurrer of the defendant to the declaration of the plaintiff filed in this case.

3. That the District Court erred in rendering judgment for the plaintiff against the defendant for the sum of $385.25.

A. W. W. WOODCOCK,
United States Attorney,
Attorney for Defendant.

29 *Writ of error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the Judges of the District Court of the United States for the District of Maryland, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between Samuel J. Graham, plaintiff, and Joshua W. Miles, formerly Collector of Internal Revenue for the District of Maryland, defendant, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 20th day of March, in the year of our Lord one thousand nine hundred and twenty-three.

[SEAL.] ARTHUR L. SPAMER,
Clerk of the District Court of the United States for the District of Maryland.

Allowed by
JOHN C. ROSE,
U. S. Circuit Judge for the Fourth Judicial Circuit.

30 [Citation in usual form showing service on Marbury and Rawls omitted in printing.]

31 In the District Court of the United States.

Stipulation of counsel as to making up transcript of record on appeal

Filed 17th April, 1923.

[Title omitted.]

It is stipulated and agreed by and between the parties to this cause that the transcript of record on defendant's appeal to the Supreme Court of the United States in said cause shall consist of the following:

1. Declaration.
2. Demurrer.
3. Additional grounds for demurrer.
4. Order of court overruling demurrer.
5. Opinion.
6. Waiver of jury trial.
6½. Order of court directing verdict.
7. Verdict and judgment.
8. Certificate of probable cause.
8½. Docket entries.
9. Petition for writ of error to Supreme Court of the United States and order allowing the same.
10. Assignment of errors.
11. Writ of error.
12. Citation.
13. Stipulation as to making up transcript of record on appeal.
14. Memorandum of the clerk.
15. Order to transmit record.
16. Clerk's certificate.

And it is further stipulated and agreed that the clerk of this court shall make up a transcript of the record in this case and transmit the same to the clerk of the Supreme Court of the
32 United States to be printed in accordance with the rules of said court.

AMOS W. W. WOODCOCK,
United States District Attorney for the District of Maryland,
Attorney for Defendant.
WILLIAM L. RAWLS,
WILLIAM L. MARBURY,
Attorneys for Plaintiff.

33 *Memorandum of the clerk.*

(1) Petition for writ of error and order of court granting writ of error, filed 20th March, 1923.
(2) Writ of error, dated March 20th, 1923.
(3) Citation, dated March 20th, 1923.
Acknowledgment of service, dated April 4th, 1923.

Order to transmit record.

In pursuance of the writ of error aforesaid, and according to the statute in such case made and provided, and of the order of court here, a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said United States Supreme Court accordingly.

Teste:

ARTHUR L. SPAMER,
Clerk.

34 United States of America, District of Maryland, to wit:

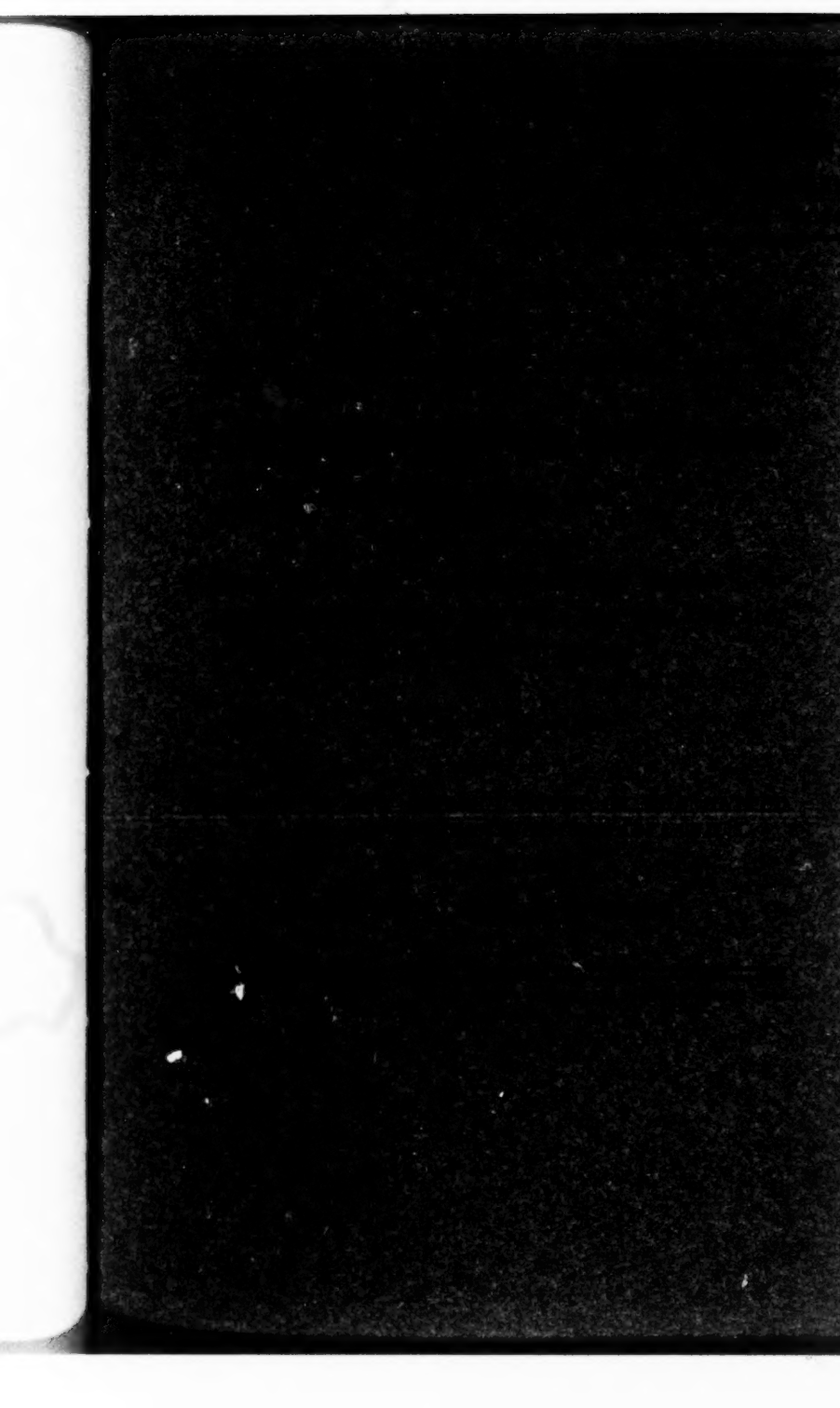
Clerk's certificate.

I, Arthur L. Spamer, clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is a true manuscript of the record and proceedings of the said District Court, together with all things thereunto relating in the therein entitled cause, made up in accordance with stipulation of counsel for the respective parties filed in said cause.

In testimony whereof, I hereunto set my hand and affix the seal of the said District Court this 18th day of April, 1923.

[SEAL.] ARTHUR L. SPAMER,
Clerk.

(Indorsement on cover:) File No. 29580. Maryland D. C. U. S. Term No. 311. Joshua W. Miles, formerly United States Collector of Internal Revenue for the District of Maryland, plaintiff in error, vs. Samuel J. Graham. Filed April 21st, 1923. File No. 29580.



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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1924

JOSHUA W. MILES, FORMERLY UNITED STATES Collector of Internal Revenue for the District of Maryland, plaintiff in error

v.

SAMUEL J. GRAHAM

No. 53

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT

Among the many provisions of the Revenue Act of 1918, approved February 24, 1919 (40 Stat. 1057), was one which included within taxable income the salary which one might receive for services as a judge of a court of the United States. The tax was to be applicable to the calendar year 1918 and to each calendar year thereafter. (Sec. 210.)

After the enactment of this statute the defendant in error was appointed one of the judges of the United States Court of Claims, entering upon his duties

upon September first, 1919. Subsequently, under protest, he made tax payments based upon the salary received by him as judge for that part of 1919 during which he was in office and for the whole of the year 1920, and brought this suit against the collector of internal revenue to recover back the said payments. The amount of his salary and the correctness of the amount of tax exacted, if his salary is taxable at all, are not in dispute. The District Court decided that his salary could not be taxed under the act of 1918, relying upon the decision of this court in *Evans* v. *Gore*, 253 U. S. 245.

Title II of the Revenue Act levies a tax upon the net income of *all* citizens or residents of the United States. Net income is defined as gross income less certain specified deductions and credits. Section 213 states that gross income—

> (a) Includes gains, profits, and income derived from salaries, wages, or compensation for personal service (*including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States*, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, *the compensation received as such*), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, se-

curities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

ARGUMENT

I

This case does not turn upon the points decided in Evans v. Gore

The Government does not challenge the correctness of the decision in *Evans* v. *Gore*, 253 U. S. 245. It is true that from the rulings in that case two justices entered a vigorous dissent; that four of the justices who concurred in the conclusion of the court have retired and four justices who did not take part in that conclusion have succeeded them; that in support of the tax which was there declared unconstitutional, reasons which were not referred to in the argument of counsel nor in the dissenting opinion might be advanced; and that the decision in its implications may affect adversely to the Government other matters which are of greater importance than the revenue to be derived from the taxation of judicial salaries. Under these circumstances the court may desire a reargument of the question decided in *Evans* v. *Gore*. Unless, however, the court shall indicate such a desire, the Government must regard *Evans* v. *Gore* as conclusive upon the points there decided.

But neither the decision in that case nor any expression in that opinion furnishes any aid to the defendant in error. That case casts no light whatever

upon the two questions whether he could have been taxed constitutionally and whether the Revenue Act of 1918 applies to him.

II

In Evans v. Gore this court did not suggest that there was any doubt as to the power of Congress to impose taxes which should apply to the salaries of federal judges appointed after the enactment of the taxing statutes

In that case the court interpreted the provision in Article III, section 1, of the Constitution that—

> The judges both of the Supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.

It decided that a tax upon a judge's salary constituted a diminution of that salary. *Judge Evans had been appointed prior to the enactment of the taxing statute.* The imposition of the tax constituted a diminution of a salary already existing during his continuance in office and was therefore unconstitutional.

The defendant in error, however, was appointed *after* the enactment of the statute under which the tax was laid. It is submitted that, within the meaning of the Constitution, the diminution of the salary did not occur during his term of office.

Upon the facts, *Evans* v. *Gore* constitutes no precedent for declaring the tax upon the defendant

in error unconstitutional. Nor is there any expression in the opinion in that case which casts doubt upon the constitutionality of the tax upon the defendant in error. The court was interested in the question whether taxation constituted diminution. It decided (pp. 263, 264) that:

> For the common good—to render him, in the words of John Marshall, "perfectly and completely independent, with nothing to influence or control him but God and his conscience"—his compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support. * * *
>
> Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation as well as otherwise.

It gave no attention to the meaning of the phrase "during their continuance in office," for in the case then before the court the diminution, if any, had unquestionably taken place during the judge's continuance in office.

If any general expressions in this decision are literally applicable to a tax imposed on a *subsequently appointed* judge, then such expressions must be interpreted in the light of the facts upon which they were predicated. (*Woodruff* v. *Parham*, 8 Wall. 123.)

III

The proceedings of the Constitutional Convention show that the Convention did not intend that the provision for the protection of judicial salaries should apply to any diminution of the compensation of judges appointed to office after a statute making the diminution had been enacted

The Virginia Plan, as proposed in the Constitutional Convention on May 29, provided in its ninth resolution that judges should—

> receive punctually at stated times fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. * * *

This resolution was considered by the Convention on July 18. After a short debate, the words "or increase" were stricken out; but this was the only change made in the provision as to the compensation of the judges. When, on July 26, the Convention referred to the Committee of Detail the twenty-three resolutions theretofore adopted, resolutions XIV and XV provided:

> That a national judiciary be established, to consist of one supreme tribunal, the judges of which shall be appointed by the second branch of the national legislature; to hold their offices during good behavior; to receive punctually, at stated times, a fixed compensation for their services, in which no diminution shall be made, so as to affect the persons actually in office at the time of such diminution.
>
> That the national legislature be empowered to appoint inferior tribunals.

On August 6 the committee reported Article XI, section 2, as follows:

> The judges of the Supreme Court, and of the inferior courts, shall hold their offices during good behavior. They shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

This provision appears in the Constitution as finally adopted, with but slight changes, proposed by the Committee of Style.

When the report of the Committee of Detail was considered on August 27, several members attempted to secure the amendment of this section so that the salaries of judges might not be increased during their continuance in office, but no member suggested that the committee had changed the effect of the resolution adopted by the Convention when when instead of providing that—

> no diminution shall be made, so as to affect the persons actually in office at the time of such diminution

their draft had provided that the compensation of judges—

> shall not be diminished during their continuance in office.

The two forms of expression were evidently considered by all of the members to be equivalent in meaning.

10416—24†—2

The purpose of the provision as to compensation, as appears from the debates, was to assure to each judge that the salary which attached to his office at the time of his appointment should not be lowered during his tenure. It was to relieve him from dependence upon the good will of Congress for the continuance of his compensation undiminished. Surely Congress exercises no undue pressure upon a judge by reducing the salary of the position before his appointment to office, and therefore such tax could not possibly have any coercive or deterrent influence.

It will be remembered that in 1700, in the Act of Settlement, Parliament had established as a protection against the Crown the constitutional principle—

> That after the said limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them.

Our own Constitution, by Article III, section 1, not only secured judicial tenure during good behavior but further relieved the judges from undue financial dependence upon the good will of Congress. What they received when they assumed office should remain undiminished during their tenure.

The provision was discussed in the Constitutional Convention twice. On July 18 the debate was as follows:

"In which [salaries] of judges no increase or diminution shall be made so as to affect the persons at the time in office."[1]

Mr. Gouverneur Morris moved to strike out "or increase." He thought the legislature ought to be at liberty to increase salaries as circumstances might require, and that this would not create any improper dependence in the judges.

Doctor Franklin was in favor of the motion. Money may not only become plentier, but the business of the department may increase as the country becomes more populous.

Mr. MADISON. The dependence will be less if the *increase alone* should be permitted, but it will be improper even so far to permit a dependence. Whenever an increase is wished by the judges, or may be in agitation in the legislature, an undue compliance in the former may be felt towards the latter. If at such a crisis there should be in court suits to which leading members of the legislature may be parties, the judges will be in a situation which ought not to [be] suffered if it can be prevented. The variations in the value of money may be guarded against by taking for a standard wheat or some other thing of permanent value. The increase of business will be provided for by an increase of the number who are to do it. An increase of salaries may

[1] In the original manuscript of Madison's Debates the proposed provision is stated as above. In the transcript of his Debates, prepared for the printer under Madison's supervision by his brother-in-law, John C. Payne, the phrase "actually in office at the time" is substituted for "at the time in office," making the transcript a more correct version of the text of the resolution then before the Convention.

be easily so contrived as not to affect persons in office.

Mr. GOUVERNEUR MORRIS. The value of money may not only alter but the state of society may alter. In this event the same quantity of wheat, the sale value would not be the same compensation. The amount of salaries must always be regulated by the manners and the style of living in a country. The increase in business can not be provided for in the supreme tribunal in the way that has been mentioned. All the business of a certain description whether more or less must be done in that single tribunal. Additional labor alone in the judges can provide for additional business. Additional compensation therefore ought not to be prohibited.

On the question for striking out "or increase" six States voted in the affirmative, two in the negative, and Georgia was absent.

On August 27:

Mr. Madison and Mr. McHenry moved to reinstate the words "increased or" before the word "diminished" in the second section, Article XI.

Mr. Gouverneur Morris opposed it for reasons urged by him on a former occasion—

Colonel Mason contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so as not to affect persons in office, and this was

the only argument on which much stress seemed to have been laid.

General PINCKNEY. The importance of the judiciary will require men of the first talents; large salaries will therefore be necessary, larger than the United States can allow in the first instance. He was not satisfied with the expedient mentioned by Colonel Mason. He did not think it would have a good effect or a good appearance, for new judges to come in with higher salaries than the old ones.

Mr. Gouverneur Morris said the expedient might be evaded and therefore amounted to nothing. Judges might resign, and then be reappointed to increased salaries.

On the question, one State voted in the affirmative, five in the negative, one was divided, and four were absent.

Mr. Randolph and Mr. Madison then moved to add the following words to section 2, Article XI, "nor increased by any act of the legislature which shall operate before the expiration of three years after the passing thereof."

On this question two States voted in the affirmative, five in the negative, and four were absent.

The purpose of the provision, as shown by the extreme position taken during the debate by Madison, Mason, and Randolph, a majority of the members of the State delegation from which the entire provision as to judicial salaries had come, and as shown by the vote of that State in opposition to allowing any increase in the salary of a judge during his con-

tinuance in office, was to do away with any possibility of legislative pressure upon the judges by the exertion of financial influence. They sought to have the underlying purpose of their resolution carried out to its logical extreme. The Convention evidently thought that there was little if any danger which could arise from increasing the salaries of judges during their continuance in office and that there were practical considerations applying to judicial salaries which would not apply to the salary of the President or to the appointment of Senators and Representatives, during the terms for which they were elected, to offices which were created or the emoluments whereof were increased during such terms. Presidents and members of Congress were to be elected for comparatively short terms while judges were to be appointed during good behavior. Quite probably because of this difference in length of tenure increases of salary of judges during the term for which they were appointed were contemplated as proper, and the Convention was unwilling to make unnecessary refinements concerning the granting of such increases.

The fact remains, however, that the fundamental reason for the adoption of the provision as to judicial salaries was to prevent judicial dependence upon Congress as to the amount of their salaries. It is submitted that Congress does not subject any judge to uncertainty, dependence, or diminution of salary if it reduces the compensation accompanying the position prior to the judge's appointment to office.

He knows what his salary is, and need not accept office if such salary is a fatal objection. In taking it, he accepts it. How then is he subjected to pressure by the reduction, within the meaning of the framers of the Constitution?

The leaders of the debates took the same attitude towards the salaries of Senators and Representatives as they took towards the salaries of judges. Gouverneur Morris said (August 14) that there could be no fear that members of Congress would overpay themselves. Madison and Mason (June 12, August 14) sought to make the salaries of Senators and Representatives fixed rather than to allow them to regulate their own wages, and urged that they should not be dependent upon the States for their salaries. The latter position was urged by Randolph and other members (June 22, August 14) and was embodied in the Constitution. Freedom from possible financial pressure rather than adequacy of compensation was the end sought.

IV

While Article III, section 1, of the Constitution forbids Congress to tax a very small proportion of the persons embraced within the broad terms of section 213 of the Revenue Act of 1918, that section is not thereby rendered inoperative as to all other persons who come within its provisions

It is clear that Congress might constitutionally have imposed a tax which would have fallen upon the defendant in error after his appointment to office. It is clear that in enacting the law of 1918 Congress

intended to authorize the tax which was collected from the defendant in error. The law was enacted as a permanent taxing statute. Congress dealt with not merely the taxes which might be collected for the year 1918 but with the taxes for years to come. (Section 210.) It looked to the future and not merely to the past and the then present. It related to future Presidents and to future judges as well as to persons who were then in office. The defendant in error clearly came within its scope.

The only questions which remain are (1) whether it can be said that Congress would not have taxed judges thereafter appointed if it had known that it could not constitutionally tax judges theretofore appointed, and (2) whether the entire section 213 of the Act of 1918 or the entire provision as to the taxation of judges was invalid because it could not constitutionally be enforced in the case of judges theretofore appointed.

(1) As Congress clearly intended that the salaries of judges *thereafter* appointed should be subject to the tax, the burden must be on the defendant in error to show that Congress would not have so intended if it had known that the salaries of judges *theretofore* appointed could not be taxed. The subsequent history of tax legislation does not support his position. Since the decision in *Evans* v. *Gore* was announced on June 1, 1920, Congress has enacted two revenue laws in each of which section 213 contains precisely the same language as to the taxation of presidential and judicial salaries as was contained

in section 213 of the Act of 1918. (Revenue Act of 1921, approved Nov. 23, 1921, 42 Stat. 227, 238; Revenue Act of 1924, approved June 2, 1924.) Knowing that the Act of 1918 could not constitutionally be enforced against the President who was in office when that statute was enacted and that neither that law nor subsequent tax legislation could be applied to the salaries of judges who were in office when the law of 1918 was enacted, Congress nevertheless used the same language in later statutes. Congress clearly intended by those later statutes to tax presidential and judicial salaries which were taxable. It is by no means improbable that Congress so intended when it enacted the law of 1918 and the burden is on the defendant in error to prove that if the decision in *Evans* v. *Gore* had been anticipated by Congress when the law of 1918 was enacted it would not have placed in that law the provision which it placed in the Acts of 1921 and 1924 after the decision in *Evans* v. *Gore* had been announced.

Moreover, the statute was not a temporary one. If Congress had simply provided that for the next two years the salaries of judges should be taxed at a named rate, a different situation would have been presented. The number of judges who could be taxed constitutionally under such a statute while it was in force would be so small in proportion to the number of judges to whom it could not constitutionally be applied that there might be room for

doubt as to the desire of Congress to impose a tax upon judges soon to be appointed. But the statute was enacted as a statute permanent in its terms. As years passed on judges who were exempt from taxation would pass from the scene—for death is even more certain than taxes; new judges would take their places, and there would be a steadily increasing proportion of judges to whom the statute could constitutionally be applied. Under such circumstances much less weight should be given to the fact that the statute can not constitutionally be applied to any of the judges who had been appointed at the time of its enactment.

Nor was the statute especially directed at the taxation of judicial salaries. It was a general revenue act. Its many titles provided for taxes not only on incomes but on war profits and excess profits, on estates, on transportation and other facilities and on insurance, on beverages, on cigars, tobacco and manufactures thereof, and on admissions and dues, together with many excise taxes, special taxes, and taxes on the employment of child labor. The title devoted to taxes on individual incomes provided (section 210):

> That * * * there shall be levied, collected, and paid for each taxable year upon the net income of *every individual* a normal tax at the following rates: * * * [Italics ours.]

By section 213 the gross income considered in estimating the net income—

> Includes gains, profits, and income derived from salaries, wages, or compensation for per-

> sonal service (including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States, and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the compensation received as such), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

The Government was laboring under enormous financial burdens. In the three months immediately prior to the enactment of this statute the disbursements of this Government were running at the rate of two billion dollars per month. (Report of the Secretary of the Treasury for 1919, p. 26.) [2] It was necessary to find additional sources

[2] "The total expenditures of the Government, exclusive of the principal of the public debt and postal disbursements from postal revenues for the war period from April 6, 1917, to October 31, 1919, amounted to $35,413,000,000, according to statistics compiled on the basis of the daily Treasury statements. Of that great total covering the disbursements for two years and seven months, $11,280,000, or nearly 32 per cent, was met out of tax receipts and other revenues than borrowed money, although the amount of taxes does not include the December 15, 1919, installment of income and profits taxes for the fiscal year 1919, nor any part of such taxes for the fiscal year 1920." The total disbursements, exclusive of the principal of the public debt, for the fiscal year 1919 amounted to $18,514,879,955.03. (Report of the Secretary of the Treasury for 1919, pp. 25, 26.)

of revenue. Taxes were laid where they had not been laid theretofore. In taxing salaries received from the Federal Government Congress intended to go to the full extent of its constitutional power. This court has decided that some of the salaries were protected from taxation by the Constitution. Nevertheless, it seems clear that Congress intended to go as far as the Constitution permitted. It can not have expected to derive much revenue from taxing the salaries of Federal judges. The total number of such judges in the entire country is less than two hundred. But Congress may well have felt that for the moral effect upon the millions of other persons throughout the United States who were called upon to pay income taxes,[3] such taxes should be levied upon every person in the country who was financially able to pay taxes unless the Constitution guaranteed him immunity from such taxes. It may well have felt that even if it should be held that the judges then on the bench were not subject to taxation upon their salaries the judges thereafter appointed should contribute toward the expenditures resulting from the Great War just as millions of their fellow-citizens were doing and must continue to do for many years to come.

---

[3] For the calendar year 1918, 4,425,111 individuals filed income-tax returns, their tax amounting to $1,127,721,835; for the calendar year 1919, 5,332,760 individuals filed such returns, their tax amounting to $1,269,630,104; for the calendar year 1920, 7,259,994 individuals filed income-tax returns, their tax amounting to $1,075,053,686. Statistics of Income, Treasury Department, for 1919, 1920.

The Congress gave an explicit statement of this intention, for section 1402 provides:

> That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered.

The word "part" connotes more than a paragraph, so that it has no bearing upon the present question. Moreover, this court did not in *Evans* v. *Gore* declare unconstitutional any "clause" of the act. If it had done so, as the clause embraces the salaries of all officers and employees of the United States, Alaska, Hawaii, or any political subdivision thereof, or the District of Columbia, the Government would have been called upon to refund all of the taxes collected upon the salaries of all of those officers and employees. This clause was not declared unconstitutional. Nor did the court decide that any part of the act was unconstitutional. All that was actually decided in *Evans* v. *Gore* was that a tax upon the salary of a federal judge constituted a diminution of that salary and that, despite the Sixteenth Amendment, the salary of a judge then in office could not constitutionally be diminished by taxation. As the facts stood in that case the salary of Judge Evans could not be taxed constitutionally.

If the saving clause had been phrased as the saving clause which appears in the Revenue Act of 1921, section 1403, 42 Stat. 227, 321, and in the Revenue Act of 1924, section 1103—

> If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby—

it would have been directly in point. The decision in *Evans* v. *Gore* was that under the circumstances of that case the salary of Judge Evans could not be taxed constitutionally. The later acts, containing precisely the same provision as to the taxation of judicial salaries as was contained in the Act of 1918, provided expressly that even though the act could not be applied constitutionally under some circumstances it should nevertheless be applied wherever the Constitution interposed no bar.

Even if the saving clause of the Act of 1918 does not *literally* apply to this case, and we do not concede it, it does show the desire of Congress that any invalidity discovered in the act should not invalidate the act in other respects.

Moreover, apart from this provision, it should be remembered that when this statute was enacted the Government stood in urgent need of all the revenue that could be secured, and that, just as the draft laws inexorably drew into the war-time service of the Government men whose special talents might

have made them far more useful to the world in other lines of activity, so for the moral effect upon the great body of taxpayers it was necessary that the Government should impose taxes upon every person who could pay them, save only those to whom the Constitution had given immunity from taxation. The intention of Congress can be clearly seen, without resort to any saving clause.

If the parenthetic section as to the President and federal judges were a distinct and independent statute, it might be argued that if unconstitutional in part it was void *in toto*, but it is a "part" of a statute, taxing *all* persons, and was only intended as a disclaimer of any intention to except these high officials. If the disclaimer is inoperative under the Constitution to some officials, it leaves the remainder of the statute operative as to all not thus exempt and falls literally within section 1402 above quoted. Certainly it shows an unmistakable intention to tax all persons up to the limits of constitutional power.

(2) Passing from the question of the intention of Congress, there arises a further question. Congress intended that taxes should be levied upon the salaries of judges then in office and, under the same law, upon the salaries of judges who should be appointed thereafter. The statute can not constitutionally be applied to the former class of judges. May it nevertheless be applied as to the constantly growing latter class? This, of course, depends upon whether the constitutional and the unconstitutional aims of Congress are separable.

The answer to this question can not be found by taking up the act provision by provision. Usually such a course is sufficient; but not always so. As to every other clause of the act it may be said that even if this provision as to the taxation of judicial salaries were unconstitutional in every aspect, its invalidity would not affect the other clauses. The particular problem before the court, however, can not be met by a scissors and paste treatment of the act. This provision itself can not constitutionally be applied in all cases; is it therefore invalid in every case? This comes back to the question whether the constitutional and the unconstitutional aims of Congress, as expressed in the same provision, are separable.

If the aims sought by Congress had been expressed in two provisions which stood side by side in the same sentence, they could unquestionably be separated, as was done in *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87. The court there said (pp. 96, 97):

> Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare and to maintain the act in so far as it is valid.
>
> Bearing in mind the reluctance with which this court interferes with the action of a coordinate branch of the Government, and its duty, no less than its disposition, to sustain the enactments of the national legislature, except in clear cases of invalidity, we reach

> the conclusion that in the *aspect* of the act now under consideration the Congress proceeded within its constitutional power. [Italics ours.]

But when Congress seeks to tax two classes of judges in one phrase, must the provision stand or fall as an entirety?

An answer may be found in the consideration of two analogous cases. Suppose that Congress or a State legislature, having power to regulate railroad rates for passenger transportation, named a rate per mile under which some railroads could secure a return sufficient to meet all constitutional requirements, while other railroads differently situated could not earn the revenue to which they were entitled under the Constitution. Would not this court uphold the regulation as to the first class of roads and declare it invalid as to the second class, as it did in the *Minnesota Rate Cases*, 230 U. S. 325, under somewhat different facts?

Or suppose that a State legislature possessed general power to enact regulations of a particular character, but that some corporations had entered into contracts with the State, not yet expired, which purported to protect them from such regulations; that the State legislature considered it probable that the regulations which it proposed to make were so far within the police power of the State that the impairment of contract clause would not apply, and therefore it enacted the general legislation without exempting corporations with which the State had

entered into those special contracts, and that this court decided that the impairment of contract clause protected some of the corporations temporarily. Legislation within the general scope of the power of the State legislature would, because of facts proven in particular cases, become invalid for reasons not applying to all corporations. Would the legislation be invalid as to all corporations, including even those which had no contracts with the State?

The Government freely concedes that this court can not be called upon to redraft a statute so as to bring one which is unconstitutional within the limits of constitutionality. A legislature could not provide that if a court determined that legislative regulations of rates were unconstitutionally low the court should fix such rates as would be constitutional. Where a statute is inherently invalid it is not the place of the courts to reshape it into a valid statute.

But, on the other hand, if the statute is not inherently unconstitutional but can not be applied in some instances *because of the facts of the particular cases*—as in the passenger rate illustration and the impairment of contract illustration—the statute should not for that reason fall in all cases.

The decision in *Jaehne* v. *New York*, 128 U. S. 189, is directly in point. The court there said (p. 194):

> The rule upon this subject, which we consider applicable, is that "a legislative act may be entirely valid as to some classes of cases and clearly void as to others. A general law for the punishment of offenses, which

> should endeavor to reach by its retroactive operation acts before committed, as well as to prescribe a rule of conduct for the citizen in future, would be void so far as it was retrospective; but such invalidity would not affect the operation of the law in regard to cases which were within the legislative control." Cooley, Constitutional Limitations, 5th ed., 215. [7th ed., 250.]

The point is further discussed in 19 Mich. Law Review, 117, 118, and in authorities cited in 6 Ruling Case Law, 130–132, especially in *State* v. *Smiley*, 65 Kan. 240, 253, 254, where the court distinguishes the *Trade-mark Cases*, 100 U. S. 82, and later cases to the same effect, saying:

> If we might be allowed to undertake the statement of a rule of interpretation applicable to the class of federal statutes considered in the above-cited cases, it would be that a power which is specifically limited can not be allowed to express itself in general terms, and a limitation of the general language to the specific power will not be implied. On the other hand, however, a power which is unlimited, except as specifically prohibited, may express itself in general terms, and the specific instances of limitation will be implied as provisos.

In *Evans* v. *Gore* Congress had legislated under a broad general power to lay taxes which was unlimited except by specific provisions. It was simply because Judge Evans showed facts outside of the statute—the date of his appointment to office—which

brought him within the exception to the general power of taxation—that the statute was held to be inapplicable as to him.

In the later revenue acts Congress *expressly* provided that if the application of any provision to any person or circumstances should be held invalid, the application of such provision to other persons or circumstances should not be affected thereby. This saving clause appears to be thoroughly valid, but it should be unnecessary. In fact, it was only confirmatory of the preceding declaration that the statute, if void in part, should be sustained to the limit of constitutional power. The principle of construction is so reasonable that it should be followed by the court in the present case, even though there were no express legislative direction. However, Section 1402, fairly interpreted, is such legislative direction.

If the first challenge of the constitutionality of the provision had been made by the present defendant in error, this court, under decisions too numerous to require citation, would have held that he was in no position to challenge its constitutionality. If it could constitutionally be applied to him, he could not complain of the application of the act to Judge Evans. Can it be that his rights are any greater because the case of Judge Evans was considered first?

It may be argued that to exempt Judge Evans from the income tax and to impose it upon Judge Graham (if both were members of the same court) would create an inequality in compensation, and that Congress

can not be presumed to have intended such inequality. I submit that this argument is fallacious.

In the first place, no such inequality exists. If judges of the same court, each receives the same salary. It is true that one has his salary subsequently diminished by an income tax, and that the other does not; but this is not inequality in any true sense of the word, for even if all judges paid an income tax on their salaries and other income, the result would be unequal by reason of the effect of a progressive tax upon different total incomes, on account of the higher bracket rates.

Moreover, the inequality—if it can be so called—is only temporary; for when all the judges who were appointed prior to the enactment of an income tax had left the Bench the new judges would each be equally liable to pay the tax.

It can not be questioned that Congress intended to tax to the limit of their power, and there is nothing in the history of the legislation nor in its text to justify the assumption that if some officials were exempt under the Constitution from the tax that all other judges would necessarily be. It is not reasonable to suppose that Congress intended that if a judge served on the Bench for forty years that a tax imposed a year after he assumed his duties would be inapplicable to judges appointed thereafter as long as he remained on the Bench and enjoyed the immunity.

V. Conclusion

The Solicitor General takes no satisfaction in presenting this argument for the consideration of the court. He recognizes the painful inadequacy of the salaries of the Federal Judiciary. It would be a satisfaction to argue that this meager compensation, to which there is no comparison in any other great and wealthy nation, should not be diminished by an income tax.

Congress, however, has shown its unmistakable intention to subject these inadequate salaries to a tax. As able counsel have and will argue the invalidity of the tax, it is fair to Congress—and, indeed, it is fair to this court—that the other view of constitutional power should be fully and fairly presented, and this I have endeavored to do.

Respectfully submitted.

JAMES M. BECK,
Solicitor General.
ROBERT P. REEDER,
Special Assistant to the Attorney General.

SEPTEMBER, 1924.

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NO. 53. OCTOBER TERM, 1924.

IN THE

Supreme Court of the United States

JOSHUA W. MILES, FORMERLY UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF MARYLAND, PLAINTIFF IN ERROR,

v.

SAMUEL J. GRAHAM.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

WILLIAM L. RAWLS,
Attorney for Defendant in Error.

WILLIAM L. RAWLS,
WILLIAM L. MARBURY,
Of Counsel.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

The defendant in error, Samuel J. Graham, a Judge of the United States Court of Claims, brought suit against the plaintiff in error, Joshua W. Miles, formerly United States Collector of Internal Revenue for the District of Maryland, to recover certain sums of money paid during the years 1920 and 1921 as taxes exacted by the plaintiff in error for and on account of salary received by defendant in error from the United States as one of the Judges of the United States Court of Claims during a part of the year 1919 and for the entire year 1920.

The question raised by the suit is whether there was any existing legal authority for the taxation of the salary

of a judge of the United States Court of Claims, received during the years 1919, 1920 on account of which the taxes in this case were collected from the defendant in error. The Revenue Act of 1918, approved February 24, 1919, (40 Stat. 1057) expressly required the inclusion within taxable income of salary received for services as a judge of the Supreme or an inferior Court of the United States.

The defendant in error contends that this requirement fell as an entirety because of its constitutional invalidity as a consequence of the decision of this Court in the case of *Evans v. Gore*, 253 U. S. 245, and accordingly there was no legal warrant for the collection of any taxes from him on account of the salary received by him as a judge of the United States Court of Claims at the times when they were exacted as set forth in his declaration, assuming for the purposes of argument only that Congress might have validly taxed a limited class of Federal judges by legislation properly declaring such intention. Furthermore the defendant in error contends that Congress cannot without violating the inhibition of Constitution against the diminition of the compensation of judges of the Supreme and inferior Courts of the United States during their continuance in office, tax the salaries received by them as such, *in the form and manner* attempted in the Act of Feb. 24, 1919.

The defendant in error on the first day of September, 1919, after being duly appointed by the President of the United States and confirmed by the Senate, qualified as one of the judges of the United States Court of Claims, one of the inferior Courts of the United States established by Congress in pursuance of the power vested in it

by Article III, Section 1 of the Constitution of the United States, and still continues to hold said office. The salary as fixed by statute for a judge of said Court is $7,500, payable in twelve monthly installments.

During the year 1920 there was assessed against him on account of the salary received by him during the year 1919 as judge of said United States Court of Claims, taxes amounting to $71.90, under the alleged authority of the above-mentioned Act of Congress, and during the year 1921 there was also assessed against him under like authority for and on account of the salary so received for the year 1920, the sum of $313.31. Defendant in error duly protested against these assessments and filed in accordance with law and with the regulations of the Commissioner of Internal Revenue in each instance his claims for abatement, which were subsequently rejected by the Commissioner of Internal Revenue, the contention of the defendant in error being that the assessments were invalid and without any constitutional warrant, because in violation of that clause of Article III, Section 1 of the Constitution, which provides that "The Judges both of the Supreme and inferior Courts shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Notwithstanding his claim and protest and his assertion of the constitutional right to have his salary as fixed by law remain undiminished during his continuance in office, there was demanded from the defendant in error by the plaintiff in error the payment of the taxes so as-

sessed against the salary received by him as a Judge of the United States Court of Claims for the years 1919 and 1920; and in order to avoid the penalties threatened, and the liability of his property to distraint because of non-payment, the defendant in error paid under protest the amounts assessed against him.

After filing his claims for refund for the amounts so paid, and appealing to the Commissioner of Internal Revenue to reverse the action of the plaintiff in error in making the assessments, and demanding payment on account thereof, and said appeals having been denied as to all the amounts mentioned, the defendant in error brought this suit, setting forth in his declaration the facts above stated. To this declaration the plaintiff in error filed a demurrer. This demurrer was overruled by the Judge of the District Court for the District of Maryland; the grounds of his ruling being stated in his opinion appearing in the record (R., 6-12). The facts alleged in the declaration being undisputed, judgment was in due course entered in favor of the defendant in error for the amounts claimed, aggregating $385.21, together with costs.

ARGUMENT.

I.

AT THE TIME OF THE ASSESSMENT AND COLLECTION OF THE TAXES IN QUESTION THERE WAS NO VALIDLY EXISTING LAW AUTHORIZING THEIR EXACTION.

The first question which arises in the case is whether or not there was any legal warrant for assessing and collecting from the defendant in error any income tax for and on account of salary received by him as a Judge of the United States Court of Claims during the years 1919 and 1920.

The defendant in error contends that at the time he became a Judge of the United States Court of Claims there was no such authority, and that apart from all other questions unless there was such authority at that time no taxes could be validly assessed or collected from him. The plaintiff in error contends that the inclusion of defendant in error's salary as a Judge of the Court of Claims was required by Section 213 of the Act of February 24, 1919 (Ch. 18, 40 Stat. 1062), which provides that gross income

> "(a) Includes gains, profits, and income derived from salaries, wages or compensation for personal service (*including in the case of the President of the United States, the judges of the Supreme and inferior courts of the United States,* and all other officers and employees, whether elected or appointed, of the United States, Alaska, Hawaii, or any political sub-division thereof, or the District of Columbia, *the compensation received as such*), of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or, use of or interest in such property; also from inter-

> est, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

This provision was before this Court in the case of *Evans v. Gore,* 253 U. S. 245, wherein it was held that the tax imposed in pursuance thereof upon the salary of a Judge of an inferior Court of the United States was contrary to the Constitutional prohibition against the diminution of his salary during his continuance in office, and was therefore invalid. The plaintiff in error in that case, whose salary as judge of the United States Court for the Western District of Kentucky was involved, was appointed in 1899, long before the enactment of the Act of February 24, 1919, but we are not concerned at this time with the question as to whether the decision of this Court in that case did or not determine that *all* judges of the Courts of the United States, specified in the constitutional provision, apart from the time of their appointment, are immune from taxation with respect to their compensation received as such. It is sufficient to say that the tax there in question was levied under the authority attempted to be expressly conferred by Sec. 213 of the Act of February 24, 1919, and that this Court held that Congress could not validly confer such authority. It is indisputable that this Court found that Congress did intend to levy a tax upon the salary of the judge who was the plaintiff in that suit, and that the tax so levied was invalid.

The defendant in error contends that as that part of paragraph (*a*) of Section 213 of the Act of February 24, 1919, which attempted to tax *all* judges of the Supreme and inferior Courts of the United States for and on ac-

count of their salaries received as such, is concededly unconstitutional and void insofar as it is applicable to judges in office prior to the time of the enactment of the Act, it must necessarily fall insofar as it attempts to tax the salaries of judges at all regardless of the time of appointment, because the intention being clear to tax *all*, the operation of the clause cannot be limited without rewriting it so as to give it a narrower scope than it was the intention of Congress it should have, a task which the Courts will not assume.

Unless the defendant in error's compensation as a judge for the years here in dispute was taxable under the Act of 1918 it was not taxable at all, because the former laws levying an income tax had been repealed.

The contention of the defendant in error is thus stated with respect to this branch of the case in order to eliminate from the proposition now under discussion the further question which will be adverted to later, as to whether in any event Congress can validly impose an income tax *in the manner attempted in the Act of February 24, 1919*, upon the salary of a judge of the Supreme or an inferior Court of the United States, regardless of whether he was appointed before or after the Act imposing such tax.

The narrow question immediately under consideration is whether this Court or any Court can reconstruct a provision of an Act of Congress so as to give it a different and more limited operation than that manifestly intended, where there is nothing to justify the assumption that Congress itself would have enacted the law as thus reconstructed.

That it was the intention of Congress to subject judges of the Supreme and inferior Courts of the United States to taxation on account of their compensation received as such indiscriminately and without regard to the time of their taking office, would seem to be foreclosed by the decision of this Court in *Evans v. Gore, supra.* In fact, there would have been no occasion whatever for a discussion regarding the great constitutional question found in that decision unless Congress by the provision of the statute then under consideration had attempted to authorize the collecion of the tax which Judge Evans had paid and which he had brought suit to recover. If the tax had been exacted by the Collector of Internal Revenue without any statutory direction, it would have been simply the unauthorized act of a government official and would, of course, have been dealt with as such, and there would have been no occasion to discuss the main question with which the decision was concerned, namely, whether the imposition of a tax by Congress upon the salary of a judge of a Court of the United States, received by him as such, is a diminution of his salary contrary to the constitutional prohibition. The consideration of that question presupposed the intention of Congress to impose the tax upon the salaries of *all* judges of the Courts mentioned in the provision under consideration, including that of the judge who was the plaintiff in the case before the Court.

That decision was not concerned with the question of whether or not the part of the statute under consideration *could be so construed* as to save it from constitutional objection. It was not contended that the language of the statute was susceptible of a construction which

would limit it to a class of judges upon whom it was claimed it could be validly operative. It was assumed throughout the opinion of the Court that Congress had intended the provision of the statute to be operative as to all judges irrespective of the time of their appointment. The great question involved was whether an income tax, levied upon the judges of the Supreme and inferior Courts of the United States as *provided* by the Act of February 24, 1919, amounted to a diminution of their salaries contrary to the Constitutional prohibition. It is unnecessary to review the contentions upon this question of the Government upon the one hand and that of Judge Evans upon the other. It is sufficient to say that it was upon every hand conceded that Congress intended to levy a tax upon the salaries of all the judges of the Courts mentioned in the provision, and the only question was whether this could be validly done. This Court (253 U. S. 248), referred to the debates in Congress showing that the provision under consideration had been incorporated in the Act of February 24, 1919, for the purpose of permitting the question of the power of Congress to tax federal judges to be determined by the proper tribunal. These debates show unmistakeably that the provision in question was intended to operate upon the salaries of all judges, irrespective of the date of their appointment, and to raise the question as to the validity of the tax imposed upon them.

Moreover, it is to be remembered that the Income Tax Acts of 1913, 1916 and 1917 (c. 16, 38 Stat. 168; c. 463, 39 Stat. 758; c. 63, 40 Stat. 329), each contained an express provision excepting from gross income upon which the tax was to be computed the compensation of the judges

then in office, so that the legislative mind was directed specifically to the contrast between the language of those acts and that of the provision now under discussion in the Act of 1918. The inference is, of course, irresistible that Congress had a broader purpose in view in the last named act than in the earlier acts.

The intention of Congress to tax the salaries of *all* judges of the Supreme and inferior Courts of the United States being, therefore, established, and it having been now adjudicated by this Court, that such a tax is a diminution of those salaries in violation of the Constitutional inhibition, the question arises whether, in view of this intention of Congress, and the decision of this Court, the provision in question can be reconstructed so as to cover only a part of that which Congress intended to include, for the purpose of permitting an argument that as thus reconstructed, it is rescued from entire invalidity. It is respectfully submitted that to so re-draw the provision is not only beyond the power of a Court but furthermore would defeat the purpose of Congress, and accordingly the whole attempt to levy a tax upon the salaries of federal judges must fail.

In *Evans v. Gore, supra,* this Court said:

> "Moreover, it appears that, when this taxing provision was adopted, Congress regarded it as of uncertain constitutionality and both contemplated and intended that the question should be settled by us in a case like this."

The House and Senate reports upon the Bill were referred to, as were also the remarks of the Chairman of

the House Committee in asking the adoption of the provision, showing that such was the view of Congress.

It is manifest from the debates in Congress that the provision taxing the compensation of judges was based upon two grounds—(*a*) That a tax levied upon net income made up either in whole or in part of the salary received by a judge did not amount to a diminution thereof within the meaning of the Constitutional inhibition; (*b*) That the Sixteenth Amendment had removed whatever bar that had previously existed to the imposition of such a tax. The opponents of the provision controverted both these propositions, and further urged the impropriety of presenting for decision such a question to the Courts. Neither of these grounds upon which the provision was justified took account of any distinction between judges appointed before and after the enactment of the statute, for if the imposition of the tax did not *diminish* the compensation of the judges it would of course have been valid as to all, and such likewise would have been the case if the asserted effect of the Sixteenth Amendment had been correct.

Notwithstanding this, we understand the plaintiff in error to contend that this Court can dissect the expression, "the judges of the Supreme and inferior Courts of the United States," so as to eliminate from it those judges appointed before the date of the enactment of the statute, namely, February 24, 1919, and retain within its scope all judges appointed after that date. It is submitted that such a distortion and mangling of a legislative provision is without precedent. This Court has time and

again refused to ignore the plain intention of Congress, as shown by the language of its enactment, when asked to do so, upon the ground that by narrowing or limiting its scope it might save it from total invalidity.

Where provisions of a statute are entirely independent and one may be separated from the other without defeating its purpose, it is, of course, permissible for the Court to say, in the absence of a contrary intention, appearing in the statute, that Congress might have enacted the one without the other. But where the legislative will is expressed in a single, indivisible provision, obviously incapable of modification without destroying its integrity, no such separation or severance is logically or legally possible. Here Congress has said that gross income shall include, in the case of "the judges of the Supreme and inferior Courts of the United States," "the compensation received as such"—not the compensation of some judges, not that of a particular class, or of those in office prior to a certain date, but "the judges," meaning all. To give the provision a more restricted meaning, an express qualification or limitation must be interpolated; one which Congress did not include and one which, it is respectfully submitted, it purposely refrained from including. It refrained because its main purpose was to have the general question of the power to tax the income of judges, in so far as it was made up of compensation received by them as such, finally determined, and it was not concerned with the insignificant question as to whether, by an ingenious method of draftsmanship, it might avoid constitutional objections and subject a limited number of judges to taxation.

So recently as the case of *Hill v. Wallace*, 259 U. S. 44, this Court considered the question of its power to resolve an act of Congress into its parts and strike down or eliminate from the act those matters which although clearly included are beyond the legislative competence of Congress, and at the same time give effect to the act as to those matters over which Congress could validly legislate. In that case, involving the so-called Future Trading Act (approved August 24, 1921, c. 86, 42 Stat. 187), Congress, under the form of a tax, undertook to regulate certain transactions which were ordinarily within the legislative control of the several States alone. All distinction between transactions in interstate and intrastate commerce was ignored in the act.

Under the authority of the *Child Labor Tax Case*, decided just previously (259 U. S. 20), it was held that the tax was invalid because on its face designed to penalize and thereby to discourage or suppress conduct, the regulation of which is reserved by the Constitution exclusively to the States. Being thus invalid as an exercise of the taxing power, the Court was urged to sustain the act as a regulation of interstate commerce by limiting its operation to transactions having to do with interstate commerce alone. The language of the act, however, making no such distinction, this Court held that such a reframing of an unconstitutional measure by inserting limitations it did not contain for the purpose of making it a valid one, was legislative work beyond the power and function of the Court (p. 70). The language of the Court on page 68 is peculiarly in point here:

> *"There is not a word in the act from which it can be gathered that it is confined in its operation to interstate commerce. The words 'interstate commerce' are not to be found in any part of the act, from the title to the closing section.* The transactions upon which the tax is to be imposed, the bill avers, are sales made between members of the Board of Trade in the City of Chicago for future delivery of grain, which will be settled by the process of offsetting purchases or by a delivery of warehouse receipts of grain stored in Chicago. Looked at in this aspect *and without any limitation of the application of the tax to interstate commerce, or to that which the Congress may deem, from evidence before it, to be an obstruction to interstate commerce,* we do not find it possible to sustain the validity of the regulations as they are set forth in this act. *A reading of the act makes it quite clear that Congress sought to use the taxing power to give validity to the act. It did not have the exercise of its power under the commerce clause in mind and so did not introduce into the act the limitations which certainly would accompany and mark an exercise of the power under the latter clause."* (Italics ours).

So it may be said that had Congress had in mind the taxation of only those judges who were appointed after the effective date of the Revenue Act of 1918, rather than the taxation of all judges, irrespective of the date of their appointment, it would have used language expressing that intention. There is not a word in the act about judges appointed subsequent to the act. The language comprehends all judges regardless of the date of holding office. The Court is as powerless in this case as in *Hill v. Wallace,* supra, to redraw the statute so as to express an intention not only different from but contrary to that which Congress has declared.

In *Butts v. Merchants Transportation Co.*, 230 U. S. 126, a question very similar to that here was involved. The provisions of the Civil Rights Act (18 Stat. 335, c. 114), had in an earlier case been declared unconstitutional so far as their intended operation within the States was concerned. It was contended in *Butts v. Merchants Transportation Co.* that this did not prevent the act from being held operative in places under the exclusive jurisdiction of the United States. But this Court decided that as Congress had in a single, indivisible set of words declared what the territorial operation should be, this language could not be dissected so as to exclude from it territory not constitutionally subject to the jurisdiction of Congress, and leave the act in force in those places over which Congress might validly legislate, when both were comprehended within the language actually employed. The discussion of the question of the severability of legislative provisions in that case is so complete and so conclusive of the present case that we quote from the opinion at length:

> "The real question is, whether the sections in question, being in part—by far the greater part—in excess of the power of Congress, are invalid in their entirety. Their words, as also those of the preamble, show that Congress proceeded upon the assumption that it could legislate, and was legislating, in respect of all persons and all places 'within the jurisdiction of the United States.' It recognized no occasion for any exception and made none. Its manifest purpose was to enact a law which would have an uniform operation wherever the jurisdiction of the United States extended. But the assumption was erroneous, and for that reason the purpose failed. *Only by reason of the general words indicative of the intended uniformity can it be said*

"Counsel for the plaintiff cites *El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U. S. 87, as an authority for holding the sections in question valid as applied to American vessels upon the high seas and to the District of Columbia and the Territories, notwithstanding their invalidity as applied to the States. The matter involved in that case was whether the provision in the Employers' Liability Act of 1906, 34 Stat. 232, c. 3073, relating to the District of Columbia and the Territories could be sustained, considering that the provision relating to interstate commerce had been adjudged invalid in *Employers' Liability Cases*, 207 U. S. 463. That Act was quite unliek the sections now before us in two important particulars: 1. It was not a penal or criminal statute, to be strictly construed, but was a civil and purely remedial one, to be construed liberally. 2. *Its applicability to the District of Columbia and the Territories did not depend upon the same words which made it applicable to interstate commerce.* On the contrary, *it dealt expressly, first, with common carriers 'in the District of Columbia, or in any Territory of the United States.,'* and second, with common carriers 'between the several States.' The latter provision had been adjudged invalid because too broad in some of its features, and the *Gutierrez Case* involved the other provision. In that case the Court, considering the terms of the statute, held that the provision relating to interstate commerce was 'entirely separable from' the one relating to the District of Columbia and the Territories, and that Congress manifestly had proceeded 'with the intention to regulate the matter in the District and the Territories, irrespective of the interstate commerce feature of the Act.' With the invalid and separable provision eliminated, there still remained a complete and operative statute in terms applying to the District of Columbia and the Territories. The differences between that Act and the sections now before us are so pronounced and so obvious that the *Gutierrez Case* is not an authority for the plaintiff. On the contrary, it is in entire harmony with the other cases before cited, as is

shown throughout the opinion and by the following excerpt (p. 97):

"'It remains to inquire whether it is plain that Congress would have enacted the legislation had the Act been limited to the regulation of the liability of employe's engaged in commerce with the District of Columbia and the Territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall. *Illinois Central R. R. Co. v. McKendree,* 203 U. S. 514; *Employers' Liability Cases,* 207 U. S. *supra.*'

"Here it is not possible to separate that which is constitutional from that which is not. Both are dependent upon the same general words, 'within the jurisdiction of the Unietd States,' which alone indicate where the sections are to be operative. Those words, as the context and the preamble show, were purposely used. They express the legislative will and cannot be limited in the manner suggested without altering the purpose with which the two sections were enacted. They must therefore be adjudged altogether invalid. *James v. Bowman* and *United States v. Ju Toy, supra; Poindexter v. Greenhow,* 114 U. S. 270, 305."

Butts v. Merchants & Miners Trans Co., 230 U. S. 126, 133, 135-138.

In answer to this contention of the defendant in error it is said that the so-called saving clause of the Revenue Act of 1918 (40 Stat. 1150) permits the provision to stand in so far as it is an exercise of valid authority, even though as written it exceeds the power of Congress under the Constitution. The saving clause relied on (Section 1402) is as follows:

"That if any clause, sentence, paragraph, or part of this Act shall for any reason be adjudged by any

> Court of competent jurisdiction to be invalid, such judgment shall not affect, impair, or invalidate the remainder of this Act, but shall be confined in its operation to the clause, sentence, paragraph, or part thereof directly involved in the controversy in which such judgment has been rendered."

The learned Judge of the District Court in a brief passage in his opinion in this case, conclusively disposed of this contention of the plaintiff in error. He said:

> "Obviously, however, this section does not help the defendant. When the clause which has been declared invalid is out of the Act, no other imposes the tax. What the Court is here asked to do is to rewrite the pertinent portion of the statute in question so that it will read as did the provisions of the Acts of 1913 and 1916 relative to this general subject. *But that would be for the Court to do what Congress expressly decided not to do. With its eyes wide open to the possible consequences, it made up its mind to seek uniformity by imposing the tax upon all judges.* Whether it would or would not have been willing to tax the minority, if the majority were immune, nobody knows, perhaps not even the members of that Congress itself, for upon that question they were never called upon to make up their minds." (Italics ours.)

The learned Judge then went on to say that in the Revenue Act of 1921 (Sec. 1403, 42 Stat. 321) there was a section which if it had been present in the Act of 1918 would have afforded a far stronger ground for the Government's contention. It declares:

> "That if any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provision to other persons or circumstances, shall not be affected thereby."

But even with respect to the more specific language of this saving clause found in the Act of 1921 this Court held in *Hill v. Wallace, supra,* where an identical provision was invoked for the purpose of having the Court segregate the constitutional from the unconstitutional purposes of the Future Trading Act, that it "did not intend the Court to dissect an unconstitutional measure and reframe a valid one out of it, by inserting limitations it does not contain. This is legislative work beyond the power and function of the Court." After referring to several decisions this Court continued (p. 71):

> "To be sure in the cases cited there was no saving provision like section 11, and undoubtedly such a provision furnishes assurance to Courts that they may properly sustain separate sections or provisions of a partly invalid Act without hesitation or doubt as to whether they would have been adopted, even if the Legislature had been advised of the invalidity in part, *but it does not give the Court power to amend the act.*" (Italics ours.)

It is further asserted by the plaintiff in error, that even if the provision with respect to the inclusion in gross income of the compensation of federal judges is eliminated from the Act of 1918, that the defendant in error would nevertheless be within other general language of the statute and would be subject to taxation upon his compensation received as a Judge.

We repeat that the discussion of the question as to whether by proper legislation expressing such intent, Congress can tax the compensation received by a judge as such, where his appointment to office is subsequent to the date of the imposition of the tax, is dealt with later

in this brief. The sole question now considered is whether or not there was any validly existing provision of law imposing such a tax at the times when the taxes in question were exacted from the defendant in error.

Plaintiff in error quotes section 210 of Act of 1918, which provides "that * * * there shall be levied, collected, and paid for each taxable year upon the net income of *every individual* a normal tax at the following rates," and contends that this alone, even if that portion of section 213 relating to the compensation of judges of the Supreme and inferior Courts of the United States is eliminated altogether from the Act because of its unconstitutionality, would nevertheless subject the defendant in error to taxation with respect to his compensation received as a judge.

To sustain this contention it must be held that the specific intent of Congress, as expressed in plain words, counts for nothing, and that the statute means exactly the same thing without this expression of specific intent as with it, so far as the questions involved in this case are concerned. In other words, that the general language referred to includes what Congress deemed it necessary to specifically and expressly provide should be included. The natural conclusion from a reading of the Act is that Congress did not intend the compensation of judges to be included in their taxable income except in pursuance to an express, specific declaration by it to that effect.

This interpretation of the Act of Congress becomes imperative when the undisputed facts surrounding the incorporation of this provision are recalled. It has been

seen that Congress desired to present a broad constitutional question for the decision of the Courts, namely, whether it had the power to tax the compensation of judges received as such. It was desired to have the question settled once and for all, whether in exercising its power of taxation it was controlled or limited by the constitutional prohibition against the diminution of the compensation of the judges. It was believed by many that a general tax imposed equally upon all persons in similar circumstances was justified under the taxing power of Congress, and that this power operated independently of and was uncontrolled and unrestricted by the specific constitutional prohibition mentioned.

The express provision regarding the inclusion of such compensation in gross income was made comprehensive in order to raise the real question with which Congress was interested and formed a separate and distinct matter of its consideration. When, therefore, it is conceded that this Court has determined that as to those judges appointed prior to the enactment of the Act of February 24, 1919, the tax imposed by it upon their compensation is unconstitutional and void, because the taxing power of Congress is restrained by that provision of the Constitution prohibiting the diminution of the compensation of federal judges during their continuance in office, the provision in question has served fully the purpose for which it was included in the Act. All judges were dealt with *as a single class, in a single expression* which must be stricken from the law, and they cannot, in the face of this express and specific action with respect to them by Congress, be included in any other provision.

If there had been no express provision in the Act of 1918 dealing with the compensation of federal judges, then the same question would have been presented which arose under the Act of 1862 (c. 119, Sec. 86, 12 Stat. 472), the history of which was referred to by this Court in its decision in *Evans v. Gore, supra.* That Act contained no specific provision respecting the taxation of the compensation of judges. It subjected the salaries of all civil officers of the United States to an income tax of three per cent. and it was made the duty of all paymasters and disbursing officers to deduct and withhold this tax at the time of paying the salaries. This provision was construed by the revenue officers as including the compensation of judges. The question was finally in the year 1869 submitted to the Attorney General for his opinion, who held that insofar as it attempted to subject judges already in office to taxation on account of their compensation it was in violation of the constitutional prohibition. He then gave his opinion as to the effect of the provision upon the salaries of those judges who had come into office subsequent to the enactment of the law. The question determined was the identical one now raised by the Government's contention under the Act of 1918, and upon it the Attorney General said:

> "As the language of the statute could have no application to the president and judges holding their offices at the time it was passed, *there would seem to be sufficient reason for holding that there was no intention that it should apply to those officers.* If it were supposed applicable to the salary of the President, the singular result would follow in his case, that, as the Constitution prohibits the increase as well as the diminution of his salary during his

term of office, if at the time when his official term commenced, his salary was subject to a deduction in the nature of a tax, it would not be competent for Congress during his term of office, by any repeal or diminution of the tax, to increase the amount paid to him. So that if the law imposing an income tax were repealed, the President alone, of all the citizens of the country, would continue liable for its payment during the term for which it had been originally imposed, if his official term so long continued. *And, in the case of the judges, as the amount of income tax laid upon salary should be varied from time to time, one judge might be liable only to the amount of part of the income tax which the law imposed on salaries generally, and different members of the same Court would be receiving different rates of compensation.*

"I think it a more reasonable view that the class of officers over which Congress had not this taxing power by the Constitution should not be held to be embraced within the general phrase, 'all salaries of civil officers,' and have therefore come to the conclusion that the just construction of the law does not require or permit any deduction of an income tax from the salaries of the President or of the Justices of the Supreme Court." (13 *Ops. Atty-Genl.*, 161.)

The reasoning of Attorney General Hoar upon the question of the construction of the provision in the Act of 1862 is determinative of the present case. Since the decision in *Evans v. Gore* it cannot be contended that Congress has the power in any real sense to tax the compensation of any judge mentioned in the constitutional prohibition against the diminution of compensation, no matter at what time he may have begun to hold office. Even if it be assumed that Congress can provide for the taxation of the compensation of all judges com-

ing into office after the date of the Act imposing the tax so that any judge taking office thereafter would do so with the understanding that the prescribed salary should be diminished to the extent of the tax, it is clear that thereafter such tax could not *be increased* during his continuance in office. For to increase it by any subsequent act would, under the principle of the decision in *Evans v. Gore,* amount to an unconstitutional diminution of his compensation. The right, if there be any, to require a judge to repay to the Government a portion of the compensation received by him as such cannot arise from the taxing power in any real sense, because if that power is once admitted to exist with respect to a given subject matter it is without limitation upon its exercise. If the right exists to require such repayment, it must be attributed to some other source of power.

It is submitted that if the power exists at all to require a judge to return to the Government a part of what he receives as compensation for his services, it must be justified under the power to fix the salary of the judges subject to the limitations prescribed in the Constitution. This being true it is obvious that Congress did not intend by the language of the provision in Section 213 of the Act of 1919 to reduce the compensation of any judges whatsoever. It did not mention in the Act the matter of a change in compensation as to any judge at all. What it did was to attempt *to tax* the salaries of all judges after they had been received, it being its intention to place them, if permisible, upon the plane of all other taxpayers with respect to the payment of a tax upon their income so far as the same was composed of their

compensation as judges. This attempt was abortive, and to now hold that the action of Congress is sustainable with respect to a limited number of judges upon the ground that Congress *might have reduced the compensation* prescribed for the office as to any judge appointed after such reduction, would be to attribute to Congress an entirely different purpose from that which it had.

Manifestly different considerations would control Congress in the exercise of the taxing power from those which would control it in the exercise of the power to fix judicial salaries. That Congress did not intend that the provision in question should operate as a reduction of the salary of the office here involved is conclusively shown by the fact that practically contemporaneously with the passage of the Act of February 24, 1919, it provided for the increase of the salary thereof (Act Feb. 25, 1919, 40 Stat. 1157).

For all these reasons it is therefore submitted upon this branch of the case that the provision of Section 213 of the Act of February 24, 1919, requiring the judges of the Supreme and inferior Courts of the United States to include in their gross income the compensation received by them as such, falls in its entirety, because incapable of being applied to any limited number of judges rather than to all, and there being no other provision of the act which by any proper interpretation can be held to require the taxation of such compensation, it must be held that the exaction of the taxes involved in this suit from the defendant in error was without any legal warrant.

II.

EVEN IF IT BE ASSUMED THAT THE PROVISION OF SECTION 213 OF THE ACT OF FEBRUARY 24, 1919, IS CAPABLE OF BEING APPLIED TO JUDGES APPOINTED SUBSEQUENT TO THE DATE OF THAT ACT, IT WOULD STILL BE SUBJECT TO THE OBJECTION THAT THE TAX, IN THE MANNER THEREBY IMPOSED, IS IN VIOLATION OF THE CLAUSE OF THE CONSTITUTION WHICH PROVIDES THAT THE JUDGES OF THE SUPREME AND INFERIOR COURTS SHALL HOLD THEIR OFFICES DURING GOOD BEHAVIOR, AND, SHALL AT STATED TIMES, RECEIVE FOR THEIR SERVICES, A COMPENSATION WHICH SHALL NOT BE DIMINISHED DURING THEIR CONTINUANCE IN OFFICE.

The plaintiff in error contends that the decision in *Evans v. Gore* does not control this case and that the question as to the power of Congress to tax the compensation of federal judges who take office subsequent to the date of the law imposing the tax is still an open one.

It is perfectly true that the particular judge whose compensation was involved in that case had been appointed many years before the passage of the Act of 1918; but it is also true that this Court did not expressly make any distinction in the application of the principle which was laid down in that case between judges appointed prior and subsequent to the date of the Act. On page 247 of the opinion this Court said:

> "Stated in its broadest aspect, the contention involves the power to tax the compensation of federal judges in general, and also the salary of the President as to which the Constitution (Art. II, Sec. 1, Clause 6) contains a similar limitation."

It is our understanding of the opinion of the Court that it was intended to decide this general question and

that it was in fact determined that Congress did not have the right, by the exercise of the taxing power, to diminish the compensation of federal judges; that is to say, the power of Congress to impose a tax upon their compensation received for their services as judges was denied. This denial we understand was based both upon the specific prohibition in the Constitution upon the diminution of the compensation of the judges of the Supreme and inferior Courts of the United States, and the limitation necessarily implied upon the taxing power from the erection by the Constitution of the three separate and independent departments of the Government.

> "The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption, as publicly assigned at the time and commonly accepted ever since, make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise, that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.
>
> "True, the taxing power is comprehensive and acknowledges few exceptions. But that there are exceptions, besides the one we here recognize, and sustain, is well settled. In *Collector v. Day,* 11 Wall. 113, it was held that Congress could not impose an income tax in respect of the salary of a judge of a state court; in *Pollack v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, 601, 653, it was held—the full Court agreeing on this point—that Congress was without power to impose such a tax in respect of interest received from bonds issued by a State or any of its counties or municipalities; and in *United States v. Railroad Co.*, 17 Wall. 322, there was a like holding as to municipal revenues derived by the

city of Baltimore from its ownership of stock in a railroad company. None of those decisions was put on any express prohibition in the Constitution, for there is none; but all recognized and gave effect to a prohibition implied from the independence of the States within their own spheres.

"When we consider, as was done in those cases, what is comprehended in the congressional power to tax, where its exertion is not directly or impliedly niterdicted, it becomes additionally manifest that the prohibition now under discussion was intended to embrace and prevent diminution through the exertion of that power; for, as this Court repeatedly has held, the power to tax carries with it 'the power to embarrass and destroy''; may be applied to every object within its range 'in such measure as Congress may determine'; enables that body 'to select one calling and omit another, to tax one class of property and to forbear to tax another'; and may be applied in different ways to different objects so long as there is 'geographical uniformity' in the duties, imposts and excises imposed. *McCulloch v. Maryland,* 4 Wheat. 316, 431; *Pacific Insurance Co. v. Soule,* 7 Wall. 433, 443; *Austin v. The Aldermen,* 7 Wall. 694, 699; *Veazie Bank v. Fenno,* 8 Wall. 533, 541, 548; *Knowlton v. Moore,* 178 U. S. 41, 92, 106; *Treat v. White,* 181 U. S. 264, 268-269; *McCray v. United States,* 195 U. S. 27, 61; *Flint v. Stone Tracy Co.,* 220 U. S. 107, 158; *Billings v. United States,* 232 U. S. 261; *Brushaber v. Union Pacific R. R. Co.,* 240 U. S. 1, 24-26. Is it not therefore morally certain that the discerning statesmen who framed the Constitution and were so sedulously bent on securing the independence of the judiciary intended to protect the compensation of the judges from assault and diminution in the name or form of a tax? Could not the purpose of the prohibition be wholly thwarted if this avenue of attack were left open? Certainly there is nothing in the words of the prohibition indicating that it directed against one legislative power and not another; and in our opinion due regard for

its spirit and principle requires that it be taken as directed against them all."

Evans v. Gore, 253 U. S. 255, 256.

But whether we are correct or not in our interpretation of the decision, and it, of course, speaks for itself, it is submitted that it follows necessarily from the narrowest interpretation that can be put upon it, that the taxing power as attempted to be exercised with respect to the compensation of judges by the Act of 1918, even when limited in its application to those judges appointed thereafter, is in violation of the Constitution.

It must be admitted, when the comprehensive nature of the taxing power is considered that whatever amount is exacted by virtue of the Act of 1918 from a federal judge on account of his having received compensation as such from the Government, cannot in any real sense be said to be exacted as a result of the exercise of the taxing power. If it were so taken in the exercise of that power, necessarily the amount exacted could be raised from time to time in the discretion of Congress, because the power once recognized acknowledges no limits. But admittedly the amount exacted from a judge at the time he assumes office cannot be increased thereafter by Congress without violating the express prohibition of the Constitution. This limitation, therefore, is so destructive of the asserted power to tax as to make it impossible with any regard to reality to describe the exaction mentioned as an exercise of that power.

The only question which remains open is whether, by regarding the Act of 1918 as simply a reduction of the

salaries of such federal judges as should thereafter come into office, in an amount equal to the tax mentioned in the Act, it can be held to be a reduction of compensation in a manner authorized by the Constitution. This question will be dealt with upon the assumption, which we think is entirely unwarranted, that the provision purporting to impose the tax can stand for any purpose.

It is not disputed that Congress may from time to time reduce *the salary* attached to a judicial office, so long as such reduction is not operative upon an incumbent thereof at the time of its taking effect. The Constitution clearly contemplates the power to change the compensation attached to a judicial office, but places limitations upon this power in order to preserve the independence of the judiciary as a separate department of the Government. For reasons of the highest public policy the framers of the Constitution put it beyond the power of Congress to diminish the salary of a judge during his continuance in office by any means whatsoever.

But this is not the only safeguard with respect to the compensation of the judges. Others are expressly provided in the same clause which contains the prohibition upon diminution. It declares—

> "The judges of the Supreme and inferior courts shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office."

Not only does this prohibit the diminution of the salary of the judges during their continuance in office, but it *enjoins* three things.

First. That there shall be *"a compensation"* fixed and determined for the judges.

Second. That the judges shall *"receive"* the compensation so fixed and determined for their services.

Third. That they shall receive this compensation *"at stated times."*

After the review of the history of this provision of the Constitution in the opinion of this Court in *Evans v. Gore* it is needless to repeat it here for the purpose of showing that the requirements of this provision were deliberately and carefully made in order to remove the independence of the judicial office from any attack whatsoever insofar as the matter of compensation was concerned. Not only was it intended to prevent the punishment of any judge through a diminution of his compensation, but it is equally manifest that the framers of the Constitution intended to remove the possibility of vexing or influencing the judges by means of any uncertainty as to the time of payment or as to the amount of compensation which they were to receive. The effect of the provision is to require that *a compensation* for the judicial offices mentioned *shall be fixed by law* and when so fixed shall be *paid* to the judges *at stated times.* Any action of Congress, therefore, which renders uncertain the amount of the compensation or the time when

the judge is entitled to receive it, or which takes it from him after it has been received, is in violation of these express requirements of the Constitution.

An examination of the Act of 1918 respecting the time of payment of the tax therein attempted to be imposed upon the compensation of judges, and the method by which the tax thereon is to be ascertained, will show indisputably that the collection of a tax upon the compensation of judges thereunder will violate all of these express constitutional injunctions as to the certainty of the amount of compensation, the time of payment and the right to receive it.

The salary of the judicial office, namely, judge of the Court of Claims, to which this defendant in error was appointed, at the time of such appointment was $7,500, having been so fixed by Act of Congress of February 25, 1919 (c. 29, 40 stat. 1157). It was expressly required that this salary should be "*payable monthly from the treasury.*" Consequently in obedience to the Constitution "a compensation" had been fixed by law, and it had been likewise provided that it should be received by the judge "at stated times," namely, from month to month.

The effect of requiring the defendant in error during the year 1920 and 1921 to repay into the treasury of the United States any part of his compensation received during the year 1919 and 1920 at the stated times fixed by law in obedience to the constitutional mandate was a palpable violation of the Constitution, in that the compensation which he was entitled to receive was sub-

sequently taken from him. It is idle to say that he has *received* it, if he is required to give up any part of it. Indisputably the Constitution means that he shall receive it, in the sense that it shall upon receipt be his. The right to receive a compensation is totally defeated if the judge is not entitled to keep it after he has received it. It goes without saying, in view of the decision in *Evans v. Gore*, that an exaction by the Government in the form of a tax on account of the compensation received by a judge as such is a diminution thereof *no matter when the judge was appointed.* When, therefore, the Government requires a judge to pay back to it a part of what he has received as compensation for his services, it has by thus diminishing it after its payment to him, deprived him of his right *to receive it at stated times.*

During four months of the year 1919 and during the entire year of 1920 the defendant in error received monthly the salary to which he was entitled under the law. The Constitution required its payment to him at stated times and Congress had also given effect to this requirement. Obviously what the Constitution requires to be paid *at a stated time* is *a compensation*, and forbids what is so paid in accordance with a law enacted in obedience to the constitutional provision, from being afterwards diminished or taken from him at any time. Otherwise the safeguards of the Constitution are an idle form.

The tax levied by the Act of February 24, 1919, having been held to be a diminution of the salaries of the

judges, the contention here made may be tested in a simple way. Would a law requiring the defendant in error, and other federal judges appointed subsequent to the act so providing, to repay to the treasury during the year following that during which their compensation had been received, a fixed percentage of that salary as a reduction thereof, be a valid enactment in view of the constitutional safeguards under consideration? Certainly in such a case it would be said that the requirements that judges should receive at stated times a compensation for their services had been violated, not only literally, but substantially, and contrary to their spirit and purpose.

The judge would not *receive* the fixed compensation for his services, if he were required to pay a part of it back. The compensation would not be received by him *at stated times, if later* he were required to return a part of it. And finally, what he would retain would not be *the compensation* fixed by law in obedience to the Constitution.

The mere fact that Congress may announce in advance of a judge's asuming office that he will be required to repay to the Government a certain portion of his salary as fixed by law after it is received, affords no warrant for such an exaction from him. If it were the reservation of a general power to raise or lower compensation it would violate all three of the requirements of the constitutional provision, (1) that the compensation should be fixed, (2) that the judge should be entitled to receive it, and (3) that it should be paid at stated times. But even if the amount to be repaid after being received were

fixed and definite, it would equally violate these requirements. As we have pointed out, the most favorable way in which the plaintiff in error can put its contention is that the provision of the Act of February 24, 1919, is not an exercise of the taxing power, but of the power to fix the compensation of the judges, and that the prohibition of the Constitution is not violated because whatever reduction in compensation resulted from the payment required under the Act had been accomplished prior to taking office by the defendant in error and therefore did not diminish his salary during his continuance therein. But this contention, of course, ignores the fact that by attempting to exercise its power of reducing the compensation of the office through the form of levying an income tax as provided in the Act of February 24, 1919, it has clearly violated not only the three requirements respecting the compensation of judges prescribed in the Constitution above pointed out, but also the express prohibition upon the diminution of a judge's salary during his continuance in office. The Act did not simply reduce the salary of the office held by the defendant in error prior to his taking the same, but it required a repayment to the Government of what he was entitled to receive *after* it had been received *and during his continuance in office.*

The Act of February 24, 1919, in so far as it taxed the compensation of judges, also violated the constitutional requirement as to definiteness of compensation to be received by a judge for his services, in that by Section 211 imposing surtaxes, the amount which is to

be paid as a tax on such compensation is rendered uncertain and can only be determined after considering the other income of the judge paying the tax in a particular year. No *definite amount was specified* as that which should be paid as a tax upon the salary of the judge separately considered, but the compensation was required to be included in his gross income upon which the amount of the tax to be paid by him was to be calculated after making the authorized deductions. Consequently, the amount by which the compensation of the judge was to be diminished from year to year, would vary in accordance with the amount of his income from other sources, and his compensation would be thus rendered unfixed and indefinite.

Section 211 imposed a surtax of one per centum of the amount by which the net income of an individual exceeded $5,000, but did not exceed $6,000; two percentum of the amount by which it exceeded $6,000, but did not exceed $8,000, and so on, increasing one per cent. for each additional $2,000 up to $100,000.

If a judge of the Court of Claims, taking office after February 24th, 1919, for instance, had had no income in that year in addition to his salary as judge, he would have paid the normal tax on $7,500, plus the surtaxes provided for that amount, but if in the next year he should have had additional income sufficient in amount to carry his net income into higher brackets he would, of course, have paid *upon that part of his net income embraced in the higher brackets,* the higher surtax or surtaxes applicable thereto. These surtaxes were, of course, to be paid

upon net income, which was arrived at by deducting from gross income the deductions named in the Act. It is, therefore, impossible to say what was the amount of the tax, which was to be paid upon any particular item going to make up gross income, but it is apparent that by reason of the requirement that the salary of the judge should be included in his gross income, the amount which was to be taken from him on account of having received it would vary from time to time accordingly as the amount of his additional income might fluctuate.

For this reason, if for no other, the attempted exaction from the defendant in error must fail. The Act not only rendered the compensation of federal judges indefinite, but clearly worked a diminution of their compensation *during their continuance in office*, where the presence of additional income required the payment of a higher rate of tax upon net income in any year after their appointment.

We have already referred to the Act of 1862, the validity of which in so far as applied to the President and judges, was passed upon by Attorney-General Hoar in 1869. It will be recalled that that Act required the deduction of *a specific tax of three per cent before payment* of the salary to the officer. The compensation never passed into his hands as an entirety. Whether the tax was designedly made definite in amount and was required to be deducted prior to payment of the salary in order to meet any of the objections here raised, cannot be known, but it rather suggests that if it were contemplated, that the compensation of judges should be taxed under that

Act, such a method of imposing and collecting the tax was selected in an effort to meet the constitutional requirements. The attempt to tax the judges by that Act was held by the Attorney-General to be ineffective on account of the prohibition against the diminution of their compensation during their continuance in office, and the Attorney-General further held, that as it fell as to those judges in office at the time of its enactment, it must fall as to all.

We refer to the Attorney-General's opinion at this time for the purpose of calling attention to the fact that the opinion which he expressed that the law could have been made applicable to judges appointed after the date of the Act, must be considered in the light of the provisions of that Act making the tax definite in amount and requiring its deduction prior to the payment of the salary. Whether such a method of imposing and collecting the tax would meet all the constitutional requirements with respect to fixing and paying the compensation of the judges need not now be discussed, because the Act here in question, namely, the Act of February 24, 1919, provides no such method.

The contention here made upon behalf of the defendant in error is not based upon a mere literal reading of the Constitution. The requirements with respect to the definiteness of compensation, the time of its payment and the right of the judges to receive it are specifically and expressly made in the Constitution in addition to the prohibition upon the diminution of their compensa-

tion during their continuance in office. The framers of the Constitution did not exercise all of this caution to no purpose. The control, which the Crown had exerted upon English judges through the means of withholding their emoluments, was one of the reasons which led to the following declaration in the Act of Settlement of 1700:

> "That after the said limitation shall take effect as aforesaid, judges' commissions be made *quamdiu se bene gesserint*, and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them."

It will be seen that the language of the Constitution is far more exact and specific than that used in the Act of Settlement. The framers of the Constitution not only provided that the judges should be entitled to "a compensation," which necessarily implied that this compensation should be ascertained and established *by law*, but they went on and directed that it should be paid "*at stated times*," and in order to leave no gap they ordained that the judges should "*receive*" it. When it is remembered that the framers of the Constitution were engaged in an effort to establish the necessary independence of the judicial department of the Government and to remove the judges from any influence from the other departments, and particularly from the legislative, the reason becomes manifest why in so short an instrument as the Constitution, where only the framework of the Government was being dealt with, these specific requirements regarding the compensation of the judges were included.

The attempt to establish an independent judiciary would have been frustrated entirely unless the compensation of the judges were so safe-guarded and guaranteed as to place it beyond the power of Congress to deal with it, in such a way as to exert pressure upon them.

It is submitted that the purpose of the Constitution was to place an absolute obligation upon Congress to enact a law establishing the compensation of the judges, and also to provide by law for its payment to them at stated times. This obligation is fundamental and inescapable. The failure to discharge it would be as much in violation of the Constitution by Congress, as its failure to provide the machinery for the exercise of the judicial power conferred upon the Judicial Department of the Government by the Third Article of the Constitution.

If Congress failed to comply with these requirements of the Constitution, the Government designed by its provisions could not exist. Any Courts, which Congress might establish, would not be those contemplated by the Constitution, unless the judges thereof were rendered independent by the certainty of the amount of their compensation, the time of its payment, and their right to receive it.

The effect of these requirements, therefore, is to make it impossible by taxation or any other indirect means to deal with the compensation of judges. Any change therein must be made directly, and in accordance with the specified requirements of the Constitution. If the Act of February 24th, 1919, be regarded as an attempt

by Congress to reduce the compensation of judges it plainly does not meet the requirements of the Constitution, because as has been shown above not only the letter of the constitutional provision has been violated, but its fundamental purpose as well.

CONCLUSION.

We therefore submit that upon both of the grounds herein urged the ruling of the District Court was right and its judgment should be affirmed.

Respectfully submitted,

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